

NAVAL LAW REVIEW

Judge Advocate General of the Navy
Vice Admiral James W. Houck, JAGC, USN

Commander, Naval Legal Service Command
Rear Admiral Nanette M. DeRenzi, JAGC, USN

Commanding Officer, Naval Justice School
Captain Stacy A. Pedrozo, JAGC, USN

Editor-in-Chief
Lieutenant Graham C. Winegård, JAGC, USN

Managing Editors
Lieutenant Commander Paige J. Ormiston, JAGC, USN
Lieutenant Emily L. Dewey, JAGC, USN

Article Editors
Commander Luis P. Leme, JAGC, USN
Lieutenant Commander Sara J. de Groot, JAGC, USN
Lieutenant Andrew Coffin, JAGC, USN
Lieutenant Ann E. Dingle, JAGC, USN
Lieutenant Jonathan M. Hawkins, JAGC, USN
Lieutenant Paul A. Richelmi, JAGC, USN
Lieutenant Megan E. Romigh, JAGC, USN
Lieutenant Steven M. Shepard, JAGC, USN

Desktop Publishing
Doris M. Soares

Editorial Board
Captain Michael J. Boock, JAGC, USN
Commander Gregory J. Smith, JAGC, USN
Commander Thomas P. Belsky, JAGC, USN
Lieutenant Commander Scott W. Thomas, JAGC, USN
Lieutenant Commander Elizabeth A. Rosso, JAGC, USN

Published by the Naval Justice School, the *Naval Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments in military and related fields of law. Views expressed in published articles must be considered solely those of individual authors and do not purport to voice the views of the Naval Justice School, the Judge Advocate General, the Department of the Navy, or any other agency or department of the United States. The *Naval Law Review* is published from appropriated funds by authority of the Judge Advocate General in accordance with Navy Publications and Printing Regulations P-35. This issue of the *Naval Law Review* may be cited as 61 NAVAL L. REV. [page number] (2012).

Report Documentation Page			<i>Form Approved OMB No. 0704-0188</i>		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 2012	2. REPORT TYPE	3. DATES COVERED 00-00-2012 to 00-00-2012			
4. TITLE AND SUBTITLE Naval Law Review. Volume 61, 2012.		5a. CONTRACT NUMBER			
		5b. GRANT NUMBER			
		5c. PROGRAM ELEMENT NUMBER			
6. AUTHOR(S)		5d. PROJECT NUMBER			
		5e. TASK NUMBER			
		5f. WORK UNIT NUMBER			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Justice School,360 Elliot Street,Newport,RI,02841-1523		8. PERFORMING ORGANIZATION REPORT NUMBER			
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM(S)			
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)			
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 164	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

SUBSCRIPTIONS

Subscription information may be obtained by writing to *Naval Law Review*, Naval Justice School, 360 Elliot ST, Newport, RI 02841-1523. Publication exchange subscriptions are available to organizations that publish legal periodicals.

DIGITAL COPIES

Digital copies of the current *Naval Law Review* and earlier volumes are available from the Defense Technical Information Center (DTIC) public website: www.dtic.mil.

CONTENTS

Articles, Essays & Notes

AT WHAT COST? AMERICA'S UNCLOS ALLERGY IN THE TIME OF "LAWFARE"	1
<i>Commander Robert C. "Rock" De Tolve, JAGC, USN</i>	
LET'S TALK ABOUT ETHICS	17
<i>Lieutenant Commander Kimberly J. Kelly, JAGC, USN</i>	
THE EMERGENCY ALTERNATIVE ARRANGEMENT EXCEPTION TO THE NATIONAL ENVIRONMENTAL POLICY ACT: WHAT CONSTITUTES AN EMERGENCY? SHOULD THE NAVY PIN ITS HOPES ON NOAH WEBSTER?	36
<i>Commander Margaret Ann Larrea, JAGC, USN</i>	
DOES AFRICOM NEED ADDITIONAL FISCAL AUTHORITIES TO ACCOMPLISH ITS MISSION SET? THE FISCAL IMPLICATIONS OF AFRICOM'S INTERAGENCY CONSTRUCT	93
<i>Major Maxwell S. Smart, USAF</i>	
FREEDOM OF NAVIGATION, ENVIRONMENTAL PROTECTION, AND COMPULSORY PILOTAGE IN STRAITS USED FOR INTERNATIONAL NAVIGATION	134
<i>Lieutenant Commander Jeanine B. Womble, JAGC, USN</i>	

Book Review

7 DEADLY SCENARIOS: A MILITARY FUTURIST EXPLORES WAR IN THE 21ST CENTURY	152
<i>Reviewed by Major John C. Dohn II, JA, USA</i>	

AT WHAT COST? AMERICA'S UNCLOS ALLERGY IN THE TIME OF "LAWFARE"

Commander Robert C. "Rock" De Tolve, JAGC, USN*

I. Introduction

In June of 2000, nearing the conclusion of his tenure as the 26th Chief of U.S. Naval Operations, Admiral Jay Johnson wrote to then Senate Foreign Relations Committee Chairperson Senator Jesse Helms, "I consider UNCLOS my most significant piece of unfinished business."¹ Nearly twelve years later, the United States is still not a party to the 1982 United Nations (U.N.) Convention on the Law of the Sea (UNCLOS).²

This writing seeks to highlight current and future national security costs associated with leaving this "business" unfinished. It begins by locating

* The author is a career officer in the U.S. Navy Judge Advocate General's Corps, currently serving as Deputy Legal Advisor, North Atlantic Treaty Organization (NATO) International Security Assistance Force Afghanistan. He earned a bachelor of arts degree in English literature from Nicholls State University (Louisiana) in 1994, a doctor of jurisprudence degree from the University of California at Davis School of Law in 1997, a master of laws degree (environmental law concentration) from the University of San Diego School of Law in 2005, and a master of arts degree from the U.S. Naval War College in 2010. Prior military assignments include service as Executive Officer, Region Legal Service Office Midwest in Great Lakes, Illinois; Assistant Force Judge Advocate for Operational and Environmental Law on the staff of U.S. Naval Forces Europe/U.S. Naval Forces Africa/U.S. Sixth Fleet in Naples, Italy; Officer in Charge, Multinational Force Iraq, Task Force 134 Magistrate Cell, Baghdad, Iraq; and Environmental Counsel for Navy Region Northeast in Groton, Connecticut. The author is particularly grateful to several professors at the U.S. Naval War College's China Maritime Studies Institute—Michael Chase, Peter Dutton, James Holmes, Nan Li, Jonathan Pollard, and Toshi Yoshihara—for the considerable expertise, insight, and enthusiasm they conveyed in their classroom seminars. He is similarly grateful to Colonel Jayme Sutton, U.S. Army for her insightful suggestions concerning a prior version of this writing, which was submitted to the U.S. Naval War College faculty on 28 January 2010 in partial satisfaction of the requirements of the National Security Decision Making and Strategic Studies course. Most recently, the author is appreciative of the outstanding editorial assistance provided by colleagues LT Graham C. Winegeart, JAGC, USN and LT David Loveless, JAGC, USN. All research done in preparation for this article involved unclassified sources. Unless specifically otherwise attributed, the views expressed herein are the personal views of the author and do not necessarily reflect those of U.S. government, NATO, or any other organization or individual. Any infirmity in this writing is certainly and solely attributable to the author.

¹ Letter from Admiral Jay Johnson, U.S. Navy, Chief of Naval Operations, to Senator Jesse Helms, Chairperson, U.S. Senate Committee on Foreign Relations (June 29, 2000) (on file with the Committee).

² United Nations Convention on the Law of the Sea, *opened for signature* 10 Dec. 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

UNCLOS within the broader context of U.S. national security interests and continuing U.S. political ambivalence over membership in international institutions. It then traces a further connection between UNCLOS and the contemporary notion of legal warfare—“lawfare”—as a means of opposing or accomplishing military and, ultimately, political objectives. The significance of U.S. UNCLOS abstention in the context of the current situations in Asia and the Arctic is then examined, as are attendant operational and force structure implications. In conclusion, it assesses the balance of U.S. national security equities as tipping sharply in favor of prompt U.S. UNCLOS accession.

II. The Evolution of UNCLOS

UNCLOS was opened for signature on 10 December 1982, at the conclusion of the Third United Nations Conference on the Law of the Sea in Montego Bay, Jamaica.³ Its comprehensive framework for oceans governance has been dubbed the “constitution”⁴ and “Magna Charta” of the oceans.⁵ In dividing the world’s oceans into contiguous legal regimes,⁶ UNCLOS has succeeded in sustainably balancing coastal state sovereign rights with the traditional navigational freedoms guaranteed all nations.⁷ Despite the overwhelming majority—over eighty percent—of nation states’ which are now members of UNCLOS,⁸ the ambivalence of the world’s leading maritime power

³ *Id.*

⁴ Official Records of the Third United Nations Conference on the Law of the Sea, 11th Sess., 185th plen. mtg. (Vol. XVII) at 13, U.N. Doc. A/CONF.62/SR.185, ¶ 47 (6 Dec. 1982), available at http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-185.pdf [hereinafter Official Records].

⁵ *The United Nations Convention on the Law of the Sea (Treaty Doc. 103-39): Hearings Before the S. Comm. on Foreign Relations*, 110th Cong. 74 (2008) (statement of Admiral Vernon Clark, U.S. Navy (Ret), Former Chief of Naval Operations). A detailed exposition of UNCLOS’ substantive provisions is beyond the scope of this writing.

⁶ UNCLOS, *supra* note 2, NAVAL WAR COLL., INTERNATIONAL LAW STUDIES VOL. 73, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 85 fig.A1–1 (A.R. Thomas & James C. Duncan eds., 1999) (providing a visual representation of the jurisdiction scheme established by UNCLOS). Pursuant to UNCLOS, as a general matter, coastal states may exercise: Sovereignty over a territorial sea extending up to 12 nautical miles from shore, UNCLOS, *supra* note 2, arts. 2–3; customs, fiscal, immigration, and sanitation enforcement authority within a contiguous zone extending up to 12 nautical miles from the seaward limit of its territorial sea, *id.* art. 33; and limited, environmental, and resource related sovereign rights within an exclusive economic zone extending up to 200 nautical miles from shore, *id.* arts. 55–57. Coastal state rights remain subject to circumscribed rights of other states to navigate under, on, and above these waters. *Id.* arts. 34–44, 90 & 124–32. The seabed beyond the jurisdiction of all coastal states is known as “the Area.” *Id.* art. 1. The extraction of resources from “the Area” is administered by the UNCLOS International Seabed Authority. *Id.* arts. 156–57.

⁷ Official Records, *supra* note 4, at 13.

⁸ U.N. OFFICE OF LEGAL AFFAIRS, TREATY SECTION, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, (Vol. III) at 441, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) [UNOLA], available at

over UNCLOS membership continues to be a source of military and diplomatic friction.

While the Reagan administration was instrumental in UNCLOS' negotiation and drafting, the U.S. delegation ultimately voted against and refrained from signing it due to concerns over deep seabed mining technology transfer provisions contained in Part XI.⁹ In a remarkable, multilateral effort to induce U.S. membership, the bulk of UNCLOS member states cooperated over the succeeding decade to revise the objectionable provisions.¹⁰ The revisions satisfied the Clinton administration, which signed the revised Part XI implementing agreement in 1994.¹¹ In the fall of 1994, President Clinton transmitted UNCLOS and the Part XI implementing agreement to the Senate requesting its advice and consent.¹² Despite consistent support from President Clinton, each of his successors, and an ideologically diverse array of stakeholders, the Senate has since withheld the consent required for the President to internationally bind the United States to UNCLOS.¹³

While UNCLOS cleared the Senate Foreign Relations Committee (SFRC) during the 108th¹⁴ and 110th Congresses,¹⁵ its progress continues to be hamstrung by significant pockets of political ambivalence over U.S. participation in international institutions. Most recently, 111th Congress SFRC Chairman Senator John Kerry included "voting out" UNCLOS for full Senate

<http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> (website brings written volume current as of 12 Dec. 2011, EDT 7:31 AM) (indicating that 162 of 197 recognized states and entities had ratified or acceded to UNCLOS).

⁹ *Id.*; Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982).

¹⁰ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, 1836 U.N.T.S. 41, 33 I.L.M. 1309; U.N. Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, United Nations Convention on the Law of the Sea: A Historical Perspective, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited 1 Feb. 2012).

¹¹ *Id.*

¹² S. Treaty Doc. No. 103-39 (1994).

¹³ See *United Nations Convention on the Law of the Sea*, U.S. SENATE COMMITTEE ON FOREIGN REL., <http://www.foreign.senate.gov/treaties/details/103-39> (last visited Jan. 12, 2012) [hereinafter SCFR] (indicating that no action has been taken on UNCLOS since it was referred back to the Committee on Foreign Relations on 2 January 2009, the date the 110th Congress adjourned).

¹⁴ S. EXEC. REP. 108-10 (2004).

¹⁵ S. EXEC. REP. 110-9 (2007).

consideration among his highest priorities.¹⁶ This did not occur, and no Senate action has been taken on UNCLOS by the 112th Congress.¹⁷

III. American Ambivalence Toward International Institutions

[I]n the cathedral of international human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.¹⁸

Professor Henkin's late 1970s observation concerning the international human rights law system remains remarkably apropos of UNCLOS in the current political environment. Contemporary UNCLOS criticisms are largely rooted in a leeriness of U.S. participation in normative international governance entities on a relatively egalitarian footing *vis a vis* other states.¹⁹ This leeriness appears partly fueled by a general antipathy toward the U.N. and, to some extent, by a misconception that UNCLOS membership subjects the United States to the authority of U.N. regulatory bodies.²⁰ Indeed, the proliferation of politicians and pundits painting the U.N. as a paragon of prolixity and anti-Americanism has perhaps prompted some UNCLOS proponents to deemphasize the U.N.'s role in its creation by favoring the generic moniker, "LOST" (Law of the Sea Treaty) over UNCLOS.²¹ For example, former SFRC Chairman Jesse Helms successfully prevented full Senate consideration of UNCLOS during his 1995–2003 tenure,²² citing concerns over sovereignty cession.²³ Another

¹⁶ Allison Winter, *Sen. Kerry Looks for Window to Ratify Law of the Sea*, N.Y. TIMES (May 7, 2009), available at <http://www.nytimes.com/gwire/2009/05/07/07greenwire-sen-kerry-looks-for-window-to-ratify-law-of-th-12208.html?pagewanted=all>.

¹⁷ SCFR, *supra* note 13.

¹⁸ Harold Hongju Koh, *Childress Lecture: A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002). Professor Koh attributes the statement to Louis Henkin, a distinguished international legal scholar and long-time professor at Columbia University. *Id.* Professor Henkin was awarded the Silver Star for his service in the U.S. Army during World War II, and he passed away on 16 October 2010. Emma Brown, *Columbia Professor Was Pioneer of Human Rights Law*, WASH. POST, Oct. 22, 2010, at B7.

¹⁹ See John Norton Moore & William L. Schachte, *The Senate Should Give Immediate Advice and Consent to the Law of the Sea Convention: Why The Critics Are Wrong*, 59 J. INT'L AFF. 1, 7 (2005).

²⁰ See *id.* ("The United Nations has no decision authority over an oceans issue under the Convention and no organization created is a branch of the United Nations. Rather, the three strictly limited organizations created report to the States parties to the treaty, not the United Nations.").

²¹ Among the larger community of U.N. critics, at least one website has been devoted solely to cataloging its purported evils. U.N. IS EVIL, <http://www.unisevil.com> (last accessed Nov. 20, 2010). This website is no longer publically accessible at the time of this writing's publication.

²² Baker Spring, *All Conservatives Should Oppose UNCLOS*, 12 TEX. REV. L. & POL. 453, 456 (2008).

conservative, Republican Senator James Inhofe of Oklahoma, recently pledged to block UNCLOS' Senate progress, complaining that “[w]e seem to be in such a hurry to give up our sovereignty to multinational organizations; the Law of the Sea certainly fits into that.”²⁴

However such concerns are certainly not unique to UNCLOS. To varying extents, politically motivated reticence has attended consideration of other treaties with national security significance. In 1977, Senator Robert C. Byrd of West Virginia famously proclaimed, “There is no political mileage for any U.S. Senator in voting for these [Panama Canal] treaties.”²⁵ Similar sentiments encountered by the Obama administration in securing Senate consent to the 2010 Strategic Arms Reduction Treaty with Russia—also possessed of broad political and military support—recently led one commentator to mull whether the “age of treaties” is waning.²⁶

Ineeded the United States also has an historical record of difficulty in finding political support for participation in international organizations. In 1919, sovereignty concerns over U.S. membership in President Wilson’s League of Nations scuttled Senate consent to the Versailles Treaty.²⁷ While the Senate did consent to the U.N. Charter,²⁸ a focus of the Roosevelt administration,²⁹ such consent would likely not have materialized absent the recently experienced reality of world war and the “veto power” it afforded the United States as a permanent member of the U.N. Security Council.³⁰ More recently, similar concerns have contributed to United States’ decision not to ratify the 1996 Rome Statute establishing the International Criminal Court,³¹ as well as its 2001

²³ Cf. Senator Jesse Helms, Chairman, U.S. Senate Comm. on Foreign Relations, Address before the United Nations Security Council (Jan. 20, 2000), <http://www.sovereignty.net/center/helms.htm> (making clear his position that the United States has not and will not cede any amount of sovereignty to the United Nations, without specifically mentioning UNCLOS).

²⁴ Winter, *supra* note 16.

²⁵ *Panama Canal Treaties: Hearings Before S. Comm. on Foreign Relations*, 95th Cong. 5 (1978) (statement of Sen. Robert C. Byrd, S. Majority Leader).

²⁶ James P. Rubin, Op-Ed., *Farewell to the Age of the Treaty*, N.Y. TIMES, Nov. 22, 2010, at A23. The Administration’s worries did not come to life, as the treaty ultimately entered into force. Treaty on Measures for Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC NO. 111-5 (entered into force Feb. 5, 2011).

²⁷ Richard Holbrooke, *Forward* to MARGARET MACMILLAN, PARIS 1919 ix (Random House, Inc. 2002) (2001).

²⁸ 91 Cong. Rec. 8190 (1945).

²⁹ See David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. LAW REV. 1491, 1496–98 (1999).

³⁰ U.N. Charter arts. 23 & 27.

³¹ Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3. The Clinton administration signed the Rome Statute in 2000; however, the Bush administration later nullified the signing without submitting the treaty for Senate consideration. Letter from John R. Bolton, Under Sec’y of State for Arms Control & Int’l Sec., U.S. Dep’t of State, to Kofi Annan, Sec’y-Gen., United

rejection of the 1997 Kyoto Protocol to the U.N. Framework Convention on Climate Change.³²

However, in other instances over the past fifty years, the Senate has mustered sufficient political will to consent to U.S. participation in a handful of international regulatory entities, including the World Trade Organization,³³ World Bank and International Monetary Fund,³⁴ North American Free Trade Agreement (NAFTA) Tribunals,³⁵ International Civil Aviation Organization,³⁶ and International Maritime Organization (IMO).³⁷ While it is clear that a variety of differing equities attended consideration of U.S. membership in the aforementioned multilateral entities, it is likewise clear that concerns over the cession of U.S. sovereignty and/or ambivalence over membership were insufficient to vitiate then existing political will for U.S. participation.

IV. Weighing the Relative Merits of UNCLOS Criticism

Irrespective of ideological affinity, most would agree that the national sovereignty implications of any proposed treaty should be carefully scrutinized. While some UNCLOS opposition arguments raise legitimate concerns—most sounding in sovereignty—many others tend toward alarmism and overreach.³⁸ The most prominent of these criticisms assails UNCLOS as a wholesale giveaway of U.S. sovereignty. The “sovereignty giveaway” indictment is largely grounded in a perceived risk that U.S. military operations would be subordinated to the whim of international regulatory and/or arbitral entities.³⁹ During his testimony before the SFRC, noted law professor and UNCLOS expert John Norton Moore dismissed this concern as a “silly objection” and equated its likelihood to the potential for a meteorite strike of the SFRC hearing

Nations (May 6, 2002) (original on file with the United Nations), *available at* http://articles.cnn.com/2002-05-06/us/court.letter.text_1_letter-treaty-rome-statute?_s=PM:US.

³² Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 Dec. 1997, 2303 U.N.T.S. 162, 37 I.L.M. 22 (1998).

³³ 19 U.S.C. § 3511 (2006).

³⁴ Bretton Woods Agreement Act, Pub. L. 79-171, § 2, 59 Stat. 512, 512 (1945) (authorizing the President to accept membership in the International Bank for Reconstruction and Development, Commonly referred to as the World Bank, and the International Monetary Fund).

³⁵ North American Free Trade Agreement Implementation Act, Pub. L. 103-182, § 101, 107 Stat. 2057, 2061 (1993) (approving the North American Free Trade Agreement); North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 639–49 (1993) (discussing parties’ participation in claims tribunals).

³⁶ Convention on International Civil Aviation pt. II, *done* 7 Dec. 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

³⁷ Convention on the Intergovernmental Maritime Consultative Organization, *done* 6 Mar. 1948, 9 U.S.T. 621, 289 U.N.T.S. 48.

³⁸ See, e.g., Norton & Schachte, *supra* note 19 (summarizing various positions in opposition to U.S. adoption of UNCLOS).

³⁹ See S. EXEC. REP. NO. 108-10, at 70–71 (2004).

room.⁴⁰ While possessed of a surface appeal, the substantive legitimacy of this objection is vitiated by the existence of an “opt out” mechanism within UNCLOS itself.⁴¹ This mechanism specifically provides member states the ability to exclude certain categories of disputes—including those concerning military and law enforcement activities—from UNCLOS’ default mandatory dispute resolutions.⁴² For example, China has opted out of UNCLOS’ mandatory dispute resolution mechanisms with respect to its military activities in a declaration incorporated into its UNCLOS ratification instrument.⁴³ The United States would almost certainly follow suit were it to accede to UNCLOS.⁴⁴ A second prevalent UNCLOS criticism accurately points out that the United States considers UNCLOS’ navigational provisions to be predominantly reflective of customary international law and, therefore, binding upon all states.⁴⁵ Thus, this “overkill” objection posits the United States can adequately retard the legitimacy of developing *ultra vires* (e.g. “securitization”) norms by continuing its traditional approach of “freedom of navigation” (FON) assertions and diplomatic protests.⁴⁶ As discussed in further detail below, these arguments ignore non-first order effects, such as the deficit in influence associated with U.S. UNCLOS abstention.⁴⁷ Given their direct effect upon operational reach, UNCLOS “access”—navigational freedom—and “anti access”—coastal nation sovereign rights to condition or prevent foreign access—provisions are critically important to the U.S. military’s ability to

⁴⁰ *Id.*

⁴¹ UNCLOS, *supra* note 2, art. 298(b).

⁴² *Id.*

⁴³ UNOLA, *supra* note 8, at 450 (opting out of mandatory dispute resolution provisions with respect to all optional categories of disputes allowable under UNCLOS’ terms, including those pertaining to military operations).

⁴⁴ *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Servs.*, 108th Cong. 35 (2005) (statement of William H. Taft IV, Legal Advisor, U.S. Dep’t of State). The statement notes with approval that the draft advice and consent resolution then under consideration by the Senate Armed Services Committee required the United States to opt out of article 298’s mandatory dispute resolution provision and to include in its accession statement the following statement: “Each State Party has the exclusive right to determine whether its activities are or were ‘military activities’ and that such determinations are not subject to review.” *Id.*

⁴⁵ See United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983); Moore & Schachte, *supra* note 19, at 25. Customary international law results from a general and consistent practice on the part of multiple states done out of a sense of legal obligation (*opinio juris*). R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 7 (3d ed. 1999). Such practice can include diplomatic and policy statements, legislation, and governmental actions (whether unilateral or in concert with other states). *Id.* at 7–12. With some exceptions, a principle of customary international law is generally binding on all states except those having publicly dissented to the principle during its emergence (a persistent objector). *Id.* at 8.

⁴⁶ See NAVAL WAR COLL., *supra* note 6, at 143. Freedom of navigation (FON) operational assertions involve the ostensibly non-provocative exercise of legally protected navigational freedoms for the purpose of establishing or maintaining relevant “state practice” and/or signaling persistent objector status. *Id.*

⁴⁷ Moore & Schachte, *supra* note 19, at 25.

project expeditionary combat power. Therefore, erosion of international consensus behind a robust interpretation of UNCLOS access provisions will effect a corresponding cost to U.S. national security interests.

V. “Lawfare” and Military Operations

The term “lawfare”—referring to the strategic use of legal claims to accomplish or oppose a military objective—was coined in 2001 by Major General Charles J. Dunlap, Jr., former Deputy Judge Advocate General of the U.S. Air Force.⁴⁸ While many legal claims pertaining to the lawfulness of naval operations are lodged both formally and informally by governmental actors—for example, through diplomatic channels or the media—it is useful to note that “lawfare” practitioners increasingly include non-state actors. Variants of “lawfare” may involve uniformed military or insurgent fighters executing a strategy of claiming illegal treatment while detained in order to undermine the perceived moral legitimacy of a state adversary; a single state or group of states seeking an International Court of Justice ruling confirming illegal aggression on the part of an adversary state; individual or organizations of peace activists suing to enjoin governmental activities relating to nuclear weapons; or environmental activists suing to block use of military sonar. Despite the somewhat ominous overtones of the word “lawfare” and the contentiousness of the claims concerned, it should be noted that the assertion of valid legal claims—as distinct from a strategy of lodging specious claim—is, of course, a legitimate means of furthering individual, organizational, and governmental objectives. Indeed, U.S. Department of Defense (DoD) policy requires that all military operations, regardless of their nature, be conducted in accordance with applicable international law.⁴⁹ While it is self-evident that the legitimacy of legal claims labeled “lawfare” must be determined on a case by case basis, it is likewise clear that the “sting” of an allegation of illegality can immediately and often irreparably diminish the perceived legitimacy of national security related actions in the eyes of governmental officials as well as their constituents. Therefore, regardless of their ultimate resolution, the underlying claims can instantaneously result in varying degrees of national security “cost” to the extent they succeed in increasing skepticism of or opposition to the national security interests of the United States.

⁴⁸ Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JOINT FORCES Q. 34, 35 (2009); Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Ctr. for Human Rights Policy, Harvard Kennedy Sch., Program on Nat'l Sec. and Human Rights, Working Papers, 2001), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

⁴⁹ U.S. DEP’T OF DEF., DIR. 2311.01E, LAW OF WAR PROGRAM para. 4.1 (9 May 2006) (C1, 15 Nov. 2010).

VI. UNCLOS' Relationship to U.S. National Security Interests

As with most comprehensive legal framework documents, UNCLOS includes many broadly worded provisions susceptible to differing interpretations. Not surprisingly, while many of UNCLOS' provisions reflect customary international law,⁵⁰ differing interpretations of key provisions have contributed to the rise of significant international political and military rifts. For example, as of 1997, over forty coastal nations—including strategically significant nations such as India and China—have claimed the right to restrict the “innocent passage” of foreign warships through their territorial waters on the basis of prior notice, consent, and/or means of propulsion.⁵¹ Similarly, a minority of coastal states—again including China—have claimed and/or sought to enforce restrictions or prohibitions on foreign military activities, such as the collection of military intelligence or the conduct of military exercises, within their exclusive economic zones (EEZs).⁵² The United States and a majority of states likewise consider such restrictions contrary to UNCLOS.⁵³ However, an adequate remedy is not readily available, as judicial and tribunal decisions have yet to definitively resolve these divergent positions. Instead, the relevant currency in the ongoing “negotiation” over the contours of UNCLOS is comprised of relevant state practice, such as diplomatic statements, naval operational assertions, domestic implementing legislation, and authoritative policy documents; institutional policy consensus from, for example, the UNCLOS International Law of the Sea Tribunal (ITLOS),⁵⁴ the UNCLOS International Seabed Authority (ISA),⁵⁵ and the UNCLOS Commission on the Limits of the Continental Shelf (CLCS);⁵⁶ and the writings of international legal scholars.⁵⁷

⁵⁰ See United States Ocean Policy, *supra* note 45; CHURCHILL & LOWE, *supra* note 45, at 17–18.

⁵¹ U.S. DEP’T OF DEF., MANUAL 2005.1-M, MARITIME CLAIMS REFERENCE MANUAL (23 June 2005) (providing details of maritime claims made by foreign nations and instances in which the United States rejects such claims); NAVAL WAR COLL., *supra* note 6, at 202 tbl.A2–1 (indicating countries that claim a restriction on warship innocent passage, contrary assertions of the right of innocent passage by the United States, and related protests made by the United States).

⁵² Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, NAVAL WAR C. REV., Summer 2009, at 101, 102.

⁵³ *Id.* at 102–03.

⁵⁴ ITLOS is an independent judicial tribunal through which member states may resolve disputes over UNCLOS’ interpretation and application. UNCLOS, *supra* note 2, art. 287.

⁵⁵ The ISA administers resource extraction from the deep seabed within “the Area.” *Id.* arts. 156–57.

⁵⁶ The CLCS issues recommendations, which are generally treated as authoritative by UNCLOS member states, concerning submissions from coastal states concerning the outer limits of continental shelves extending beyond 200 nautical miles from shore. *Id.* art. 76.

⁵⁷ Full membership in all three entities is open only to subject matter experts from UNCLOS member states. *Id.* arts. 157 & 159 (stating that only a State Party to UNCLOS is a voting member of the ISA); *id.* Annex VI, art. 4 (stating that only a “State Party” to UNCLOS may nominate and

Since development of customary international legal norms is disproportionately shaped by the positions and actions of the world’s most politically, economically, and militarily influential nations, the traction of an emerging “securitization” norm could potentially increase as leading state proponents, such as China and India, continue to gain political, economic, and military stature. Similarly, while the actions of landlocked nations can play a role in the development of customary international law of the sea, the role of coastal nations is particularly influential in this regard. However, while crystallization of a “securitization” norm into customary international law would clearly constitute ultimate success for a nation state “lawfare” practitioner, more realistic intermediate goals are achievable. For example, a coastal nation may successfully dissuade an expeditionary nation from challenging an excessive claim by exploiting the expeditionary nation’s political vulnerability or desire to avoid military escalation. Additionally, a coastal nation may effectively undermine an adversary’s legitimacy through consistently pressed, specious claims. In either case, an expeditionary nation such as the United States risks incurring additional diplomatic and political costs if it chooses to persist in contested operations. These costs can be conceptualized as “drag” on the U.S. government’s ability to protect sea lines of communication, collect intelligence, conduct military hydrologic survey operations, and maintain the required force structure to accomplish these. Therefore, the opportunity costs associated with non-membership in UNCLOS can be meaningfully correlated to the vulnerabilities associated with maritime “lawfare”—operational latitude, legitimacy, and maximal effective ability to influence maritime law and policy.

VII. Securitization Efforts in the East and South China Seas

In the coming decades, the importance to U.S. national security of sustainable, robust access to Asia’s sea lines of communication will likely remain of paramount importance.⁵⁸ Unfortunately, U.S. UNCLOS abstention continues to steadily facilitate China’s efforts to narrow the accepted scope of navigational and operational freedoms enjoyed by military vessels within foreign territorial seas and EEZs.⁵⁹

vote on the election of members to ITLOS); *id.* Annex II, art. 2 (limiting membership in CLCS to persons from a “State Party” to UNCLOS).

⁵⁸ See Ji Guoxing, *SLOC Security in the Asia Pacific* (Asia-Pac. Ctr. for Sec. Studies, Occasional Paper Series, Feb. 2000), available at <http://www.apcss.org/Publications/Ocasional%20Papers/OPSIloc.htm>.

⁵⁹ See generally Peter A. Dutton, *Charting a Course: U.S.-China Cooperation at Sea*, CHINA SECURITY, Winter 2009, at 11. China and sixteen other countries also claimed “securitization” rights in their territorial seas and/or EEZ in their instruments of UNCLOS ratification. UNOLA, *supra* note 8, at 444–72. China incorporated four declarations into its 1996 UNCLOS ratification instrument and made an additional declaration in 2006: (1) sovereign rights and jurisdiction over

In May 1997, two senior strategists of the Chinese People's Liberation Army (Navy) (PLAN) published their perspective on China's continuing efforts to shape the interpretation and application of UNCLOS. The writing asserted, in relevant part:

The seas are of crucial importance because (1) The new world maritime order is not yet established (2) The U.N. will become the main arena of maritime contention (3) Maritime development will become the major means by which certain countries achieve their political aims (4) Instability in [Chinese] local seas will escalate, and (5) The Asia Pacific region will become . . . one of the regions controlling the world economy.⁶⁰

Having long recognized the efficacy of legal "securitization" claims as a mechanism through which to bolster regional sea control, China has apparently developed an effective strategy in furtherance of its objective.⁶¹ This strategy rests upon China's UNCLOS stance and includes declaratory statements incorporated into China's UNCLOS ratification depositary instrument and includes domestic legislation formally claiming security interests in its territorial seas and EEZ, development of supporting legal scholarship, and a complementary strategic communications campaign.⁶² As China gradually works to set conditions conducive to marginalizing U.S. influence in the East, Southeast, and South Asia regions, its dramatic economic growth will likely further boost its ability to influence the behavior of smaller regional neighbors in a manner consistent with China's UNCLOS "securitization" narrative. The absence of a formal U.S. commitment to UNCLOS is yet an additional vulnerability China can exploit in inducing its neighbors' to acquiesce in its territorial seas and EEZ claims. Such acquiescence would strengthen China's ability to claim territorial sea sovereignty over vast swaths of the East and South

China's EEZ and continental shelf; (2) opposed equidistance resolution method for overlapping EEZs or continental shelves in favor of bilateral negotiations; (3) sovereignty assertions over islands contained within its 1992 domestic legislation delimiting the Chinese territorial seas and contiguous zone; (4) foreign military ships' innocent passage through China's territorial seas is subject to approval by China; and (5) Declaration of Part XV dispute procedures concerning disputes referred to in paragraph 1 (a), (b), and (c) of Article 298 of UNCLOS. *Id.* at 450.

⁶⁰ Yan Youqiang & Chen Rongxing, *On Maritime Strategy and the Marine Environment*, 10 ZHONGGUO JUNSHI KEXUE [CHINESE MILITARY SCIENCE] 81, 92 (1997), translated in BERNARD D. COLE, THE GREAT WALL AT SEA 12 (2001).

⁶¹ See, e.g., Jin Hongbing, *Legal Warfare: Sharp Tool to Seize the Opportunity to Grab the Initiative*, RENMIN HAIJUN [PEOPLE'S NAVY], Mar. 29, 2006 (China) (English translation on file with author).

⁶² Wensheng Cong, 使用在处理突然的事件的法律 [The Use of Law in Handling Sudden Incidents], CHINA MIL. SCI. J. (2006) (China) (English translation on file with author).

China Seas, seriously hampering the United States' ability to project military power in the region.⁶³

Further evidence of a multi-pronged strategy can be inferred from China's operational military efforts to reinforce its *ultra vires* UNCLOS positions. Specifically, China has, on occasion, engaged in illegal, unsafe airborne and seaborne tactical maneuvers in an attempt to dissuade the United States from conducting military operations—principally, military survey operations and intelligence collection—within the Chinese EEZ.⁶⁴ Additionally, it has occasionally demonstrated a willingness to employ military force in support of its contested claims to sovereignty over certain offshore islands.⁶⁵ In short, by pressing contested claims to maritime territorial sovereignty while simultaneously pursuing aggressive military tactics in support of *ultra vires* security rights in offshore waters, China has demonstrated an efficacious strategy to consolidate control over the vast majority of the South and East China Seas. Toward this end, China has the advantage of operating from interior lines—both geographically and rhetorically—*vis a vis* the United States, due both to its status as an UNCLOS member nation and a state attempting to regulate the waters adjacent to its coast. Thus, to the extent the United States seeks to project a maritime military presence in a manner inconsistent with China's UNCLOS stance, China may gain some traction domestically, as well as internationally, by criticizing the United States as an imperialistic power seeking to threaten and provoke a distant, peace-loving nation in the waters adjacent to its coast. U.S. UNCLOS abstention will continue to facilitate China's ability to cast U.S. UNCLOS interpretation as self-serving and disingenuous by highlighting that the United States is seeking to extract the benefit of UNCLOS

⁶³ Taiwan, Vietnam, Brunei, Philippines, and Malaysia are each involved in contests with China over offshore islands. Peter Dutton & John Garofano, *China Undermines Maritime Laws*, FAR E. ECON. REV., Apr. 2009, at 44, available at <http://www.feer.com/essays/2009/april/china-undermines-maritime-laws>.

⁶⁴ E.g., Pedrozo, *supra* note 52. On March 8, 2009 and March 23, 2001, respectively, Chinese governmental vessels engaged in unsafe, harassing maneuvers in close proximity to unarmed U.S. military research vessels USNS *Impeccable* and USNS *Bowditch* while the latter vessels conducted lawful military survey operations within the Chinese EEZ. *Id.* at 101. *Contra Ji Guoxing, The Legality of the “Impeccable Incident”*, CHINA SECURITY, Spring 2009, at 16, 17 n.2 (asserting the *Impeccable*'s military survey mission constituted use of the Chinese EEZ for non-peaceful purposes in violation of UNCLOS). On April 1, 2001, a Chinese fighter jet engaging in close-in harassing maneuvers collided with a U.S. Navy marine patrol aircraft lawfully gathering military intelligence in airspace superjacent to China's EEZ. The Chinese pilot died while ejecting. The U.S. aircraft was damaged and forced to land on Chinese territory (Hainan Island). These incidents were ostensibly motivated at least in part by China's desire to communicate its resolve with respect to its *ultra vires* legal prohibitions of foreign military research and intelligence collection within its EEZ. Pedrozo, *supra* note 52, at 107.

⁶⁵ See, e.g., COLE, *supra* note 60, at 28. In a clash over their conflicting sovereignty claims to the Spratly Island chain, the Chinese People's Liberation Army Navy (PLAN) sank three Vietnamese ships. *Id.*

but avoiding membership due to its distrust of the international community. It is not inconceivable that such a narrative would resonate with many coastal states, especially if the United States' relative regional and global primacy is seen to be diminishing. All else equal, nations with vulnerable coasts and small fleets might perceive an UNCLOS "securitization" norm as more attractive than the current, generally-accepted norm permitting robust military operations within EEZs and almost unrestricted innocent passage through territorial waters. Furthermore, as an UNCLOS member nation, China remains better positioned than the United States to influence UNCLOS interpretation from within UNCLOS regulatory institutions such as the ISA, ITLOS, and CLCS.⁶⁶

VIII. The Arctic, UNCLOS, and National Security

Recent geopolitical developments in the Arctic region highlight yet another circumstance where both UNCLOS and U.S. national security interests are implicated, as thawing Arctic floes have brought the Arctic Ocean's untapped resource and navigation potential increasingly to the fore. States with Arctic Ocean borders—United States, Canada, Russia, Finland, Iceland, Norway, and Sweden—are, therefore, concerned with the full spectrum of national security implications—political, economic, and military—associated with increased Arctic Ocean maritime transit and resource related activity.⁶⁷ Conflicting claims to the Arctic Ocean's waters and seabed have already commenced. A prime example is Russia's 2007 claim to the Lomonosov Ridge—a 1,200 mile long undersea swath in the vicinity of the North Pole—as part of its continental shelf.⁶⁸ While the Lomonosov Ridge is currently considered beyond the jurisdictional reach of any country and, therefore, administered by the ISA,⁶⁹ Russia has demonstrated interest in obtaining CLCS confirmation of its claim to exclusive resource extraction rights.⁷⁰ Indeed the trend toward utilizing the CLCS appears to be intensifying, and will likely play a central role in de-conflicting Arctic Ocean claims. One such indication is the 500% year to year increase in petitions submitted to the CLCS from 2008 to

⁶⁶ As a UNCLOS non-member state, U.S. participation in these organizations is limited. *See supra* note 57.

⁶⁷ All of these Arctic Ocean "stakeholder" nations are UNCLOS members except the United States. UNOLA, *supra* note 8.

⁶⁸ Will Stewart, *Putin's Arctic Invasion: Fears As Russia Claims Undersea Oil Zone the Size of Five Britains*, DAILY MAIL (London), June 29, 2007, at 21.

⁶⁹ Angelle C. Smith, Note, *Frozen Assets: Ownership of Arctic Mineral Rights Must Be Resolved to Prevent the Really Cold War*, 41 GEO. WASH. INT'L REV. 651, 656–57 (2010).

⁷⁰ See *Arctic Seabed Belongs to Russia*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/7005483.stm> (last updated 20 Sept. 2007). UNCLOS Article 76 provides that the CLCS shall make recommendations concerning submissions from coastal states concerning the outer limits continental shelves extending beyond 200 nautical miles from shore. UNCLOS, *supra* note 2, art. 76. These recommendations are generally treated as authoritative by UNCLOS member states. *Id.*

2009.⁷¹ As in the East and South China Sea, it appears likely that UNCLOS and its regulatory entities will play a critical role in economic and national security “scrum” beginning to play out in the Arctic region.

IX. Implications for U.S. Maritime Operations and Force Structure

“The ability to operate freely at sea is among the most important enablers of joint and interagency operations . . .”⁷² Therefore, sustainable access to key regional sea lines of communication directly impacts the efficacy of nearly every maritime mission set in the U.S. arsenal. Especially affected are those missions conducted in the littoral and near shore waters up to 200 nautical miles from shore. This is because the near shore environment represents a primary operating area for critical “sea basing, amphibious, expeditionary and intelligence collection operations.”⁷³ Intelligence collection is particularly important given the U.S. national security establishment’s continuous need for a broad range of operational indicators. As was seen during the Cold War, the ability to collect intelligence within foreign EEZ’s can contribute to a state of “enforced transparency” between potential adversaries, as well as serve a forcing function of encouraging candor and good faith in military and political dealings.⁷⁴ In addition to intelligence collection, other enduring maritime mission sets—many of a constabulary nature, such as maritime interdiction in support of counter piracy, counter narcotics, and Proliferation Security Initiative—also stand to be adversely impacted to the extent coastal nations engage in EEZ “securitization lawfare.”⁷⁵ Also, any limiter on DoD’s ability to sustain and refine the aforementioned maritime mission sets ultimately constrains Congress’ ability to efficiently allocate national security procurement resources and optimize return on that investment. For example, the U.S. Congress has invested heavily in littoral and near shore naval platforms, authorizing over \$12 billion through fiscal year 2011 for construction of next

⁷¹ See U.N. Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, Submissions, Through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, http://www.un.org/Depts/los/clcs_new/commission_submissions.htm (last updated 18 Jan. 2012).

⁷² U.S. MARINE CORPS, U.S. NAVY & U.S. COAST GUARD, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEA POWER (2007), available at <http://www.navy.mil/maritime/Maritimestrategy.pdf> (last visited Feb. 1, 2012).

⁷³ James Kraska & Brian Wilson, *China Wages Maritime “Lawfare”*, Posting to *The Argument*, FOREIGN POL’Y (Mar. 12, 2009, 1:51 AM), http://experts.foreignpolicy.com/posts/2009/03/11/china_wages_maritime_lawfare.

⁷⁴ Peter A. Dutton, The Geostrategy of UNCLOS: Law of the Sea in the 21st Century (2009) (unpublished manuscript) (on file with the U.S. Naval War College).

⁷⁵ See Ji Guoxing, *supra* note 58, at 17 n.2 (taking the position that maritime interdiction operations in support of the U.S. led Proliferation Security Initiative are controversial and contrary to international law).

generation littoral combat ships.⁷⁶ Similarly, it authorized \$1.3 billion from fiscal years 2006 through 2010 for DoD training of foreign military and maritime security forces.⁷⁷ While this investment will enhance the ability of the United States to sustain homeland defense as well as theater security cooperation missions in waters adjacent to partner nations, UNCLOS “securitization” claims will constitute a continuing planning restraint for some maritime missions in the near shore environment.

X. Conclusion

It is myopic for the United States to gamble that its extant approach of FON assertions and diplomatic protests will be an adequate near and long-term course of action, especially in an era of increasing national security interconnectedness. Under the geopolitical conditions prevalent during the last fifteen years, the United States may well have been better postured to leverage its significant political, economic, and military influence in support of its maritime security objectives than it will be in the coming twenty five years. While UNCLOS critics appear content to assume that staying the current course of UNCLOS abstention for the next twenty-five years is unlikely to result in adverse impact, such a sanguine assumption ought to be regarded with an “all else equal” asterisk. While the aforementioned relative advantage has clearly not evaporated, the current trend toward its erosion appears to portend that “all else” will likely not be equal going forward. Given that the dynamics of political and customary international legal norm development typically include interrelated, gradual incubation periods, as well as discernable “tipping points,” a more exacting predictive model is appropriate. This is especially so given the potential that significantly increased political, economic, and military costs could attend sustaining current access levels to key regional sea lines of communication in the future. As Professor Kraska posits, “The strategic, operational and political ‘landscapes’ of the sea have changed.”⁷⁸ As can be seen from the assessments of some among the Chinese naval establishment in 1994, the year UNCLOS entered into force for member states, he is not alone in this view.⁷⁹

By contenting itself with UNCLOS abstention, the United States continues to facilitate long-term efforts by numerous coastal states—most

⁷⁶ RONALD O'ROURKE, CONG. RESEARCH SERV., RS21305, NAVY LITTORAL COMBAT SHIP (LCS): BACKGROUND AND ISSUES FOR CONGRESS 3 tbl.1 (2006).

⁷⁷ NINA M. SERAFINO, CONG. RESEARCH SERV., RS22855, SECURITY ASSISTANCE REFORM: “SECTION 1206” BACKGROUND AND ISSUES FOR CONGRESS 6 (2011).

⁷⁸ James Kraska, *Grasping the “Influence of Law on Sea Power”*, NAVAL WAR C. REV., Summer 2009, at 113, 114.

⁷⁹ See, e.g., Jin Hongbing, *supra* note 61.

significantly China and Russia—to bolster a range of *ultra vires* maritime claims to the detriment of U.S. navigational freedoms. Because the principal advantages of UNCLOS membership—operational latitude, political and legal influence, legitimacy, and a decreased likelihood of bilateral “turf tension”—are by their nature difficult to discern and quantify, UNCLOS proponents do not have the luxury of political “sex appeal” in making their case, especially in light of America’s continuing ambivalence toward membership in international institutions. While U.S. UNCLOS membership would certainly not immediately eliminate the aforementioned “securitization” claims,⁸⁰ the alternative continues to leave a clear path for China and others to further their claims while cloaked in the political legitimacy attendant to leading from the front of the 160 strong community of member states.⁸¹

Applying Professor Henkin’s human rights law metaphor, it is time for the United States to evolve from its “flying buttress” role to that of leadership from “inside the UNCLOS cathedral.”⁸² Applying Admiral Johnson’s assessment, the United States should, in the interest of its national security, forthwith “finish the business” of joining UNCLOS and get on with the business of reclaiming its leadership role in international oceans policy.⁸³

⁸⁰ See *supra* note 59.

⁸¹ See *supra* note 8.

⁸² See *supra* note 18 and accompanying text.

⁸³ See *supra* note 1 and accompanying text.

LET'S TALK ABOUT ETHICS

Lieutenant Commander Kimberly J. Kelly, JAGC, USN*

“An association of attorneys that fails to hold even its most junior members professionally accountable loses public confidence.”¹

I. Introduction

Professional accountability should rest upon a solid foundation of professional training. Accordingly, most states with mandatory continuing legal education requirements include a specific requirement of ongoing education on legal ethics.² However, many states also exempt attorneys who are serving on active duty in the military or practicing outside their jurisdiction from those same continuing legal education requirements. Thus, the sole mandatory training on legal ethics received by many Navy and Marine Corps judge advocates following law school includes training provided by the Naval Justice School in the Basic Lawyer Course and thereafter the online Professional Responsibility Certification Course.³ Any additional ethics education received by judge advocates is dependent upon their own initiative or that of their command training officer or command leadership. Yet, as in any area of practice, the practice of law in the Navy’s Judge Advocate General’s Corps (JAG Corps) can present a minefield of ethical issues. Moreover, as one practitioner has noted that “the intrinsic nature of military practice” creates its own brand of ethical issues.⁴

* Lieutenant Commander Kelly is a member of the Judge Advocate General’s Corps, U.S. Navy. She is presently assigned as Officer-in-Charge, Region Legal Service Office Southeast, Detachment Pensacola. She earned a bachelor of arts degree from Cornell University in 1991, a doctor of jurisprudence degree from Vanderbilt University Law School in 1994, and a master of laws degree in litigation and dispute resolution from The George Washington University Law School in 2010. The views expressed herein are solely those of the author and do not reflect the official positions of the Department of Defense or the Department of the Navy.

¹ United States v. Hutchins, 68 M.J. 623, 633 (N.M. Ct. Crim. App. 2010) (MakSYM, Senior J., concurring), *reversed and remanded*, 69 M.J. 282 (C.A.A.F. 2011).

² Bruce A. Green, *Teaching Lawyer Ethics*, 51 ST. LOUIS U. L.J. 1091, 1095 (2007).

³ Memorandum from the Rules Counsel, Office of the Judge Advocate General, U.S. Navy, to Covered Attorneys, subject: “Good Standing” Certification Requirement and Professional Responsibility Training (13 Jan. 2010). The Professional Responsibility Certification Course is made available online when required through the Navy Knowledge Online website, <https://nko.navy.mil>. No current version is available.

⁴ Major Charles H. Rose III, *Professional Responsibility: Peering over the Shoulder of Trial Attorneys*, ARMY LAW., May 2001, at 11.

This article posits that mandatory, periodic ethics training following Naval Justice School and beyond the requisite online Professional Responsibility Certification Course will assist Navy judge advocates, particularly new attorneys, in “recogniz[ing] when an ethical concern is approaching (or has already arrived)” and in addressing the concern appropriately.⁵ More specifically, the training should be designed to develop a habit in each judge advocate of actively and critically examining her practice for potential ethical issues and talking about those issues with both colleagues and supervisors. I propose that interactive training in which a judge advocate must be an active participant, rather than training such as lectures and static online presentations that reinforce a passive role, is most effective.

I am not, however, suggesting that there is an epidemic of unethical behavior in the Navy’s JAG Corps; in fact, available statistics would not support that proposition. Nevertheless, attorneys practicing under the cognizance of the Navy Judge Advocate General do not always successfully navigate the minefield of ethical issues. The Administrative Law Division, Office of the Judge Advocate General, reports an average of approximately eleven professional responsibility complaints per year between 2000 and 2009,⁶ totaling 111 complaints.⁷ These statistics may not capture all alleged ethical violations within the Navy JAG Corps, because not all ethical violations generate a formal complaint. The current list of those attorneys who have been disciplined by indefinite decertification under Article 27(b), Uniform Code of Military Justice (UCMJ), or by indefinite suspension, names thirty attorneys, including nine

⁵ Lieutenant Colonel Michael Denny, *Enhancing Ethical Awareness*, ARMY LAW., May 1990, at 52.

⁶ Command Auth. & Investigations Branch (Code 134), Admin. Law Div., Office of the Judge Advocate Gen., U.S. Navy, Professional Responsibility Cases (23 Mar. 2010) [hereinafter Code 134] (unpublished investigation tracker) (on file with author).

⁷ How do these numbers compare to the numbers of complaints filed with, and attorneys disciplined by, state bars? I examined the Tennessee Bar Association, an organization of which I am a member. The most recent report published on the website of the Tennessee Board of Professional Responsibility (TBOPR) is from 2006. In that year, the TBOPR received a total of seventy-two complaints and had a membership of 939 active attorneys, leading to a complaint rate of approximately 7.6 percent. BD. OF PROF’L RESP. OF THE SUP. CT. OF TENN., THIRTIETH ANNUAL REPORT, *available at* <http://www.tbpr.org/NewsAndPublications/AnnualReports/Pdfs/annualreport30th.pdf>. Nine of the seventy-two complaints resulted in some form of disciplinary action ranging from suspension to private admonition. *Id.* Meanwhile, the JAG Corps has received an average of eleven complaints per year against an average of 730 active duty Navy judge advocates and 435 active duty Marine Corps judge advocates, leading to a complaint rate of approximately 1 percent. Code 134, *supra* note 6. However, the comparison is fraught with difficulty, as state bar associations are comprised of a significant number of private practitioners with paying clients. In the JAG Corps this is never the case. This issue alone presents a different landscape of potential ethical issues. Moreover, there may be some impact from the fact that selection for the JAG Corps involves a layer of screening in addition to that used by state attorney licensing authorities.

civilian attorneys, thirteen reserve attorneys, and eight active duty attorneys.⁸ The most recent case of indefinite suspension or decertification is dated 22 August 2008.⁹ The majority of cases were ultimately closed due to lack of probable cause to believe an ethical violation had occurred.¹⁰ Where probable cause was established, the most common disposition short of decertification or suspension was corrective counseling.¹¹ As of spring 2010, the Administrative Law Division identified four professional responsibility complaints pending an initial screen or otherwise being investigated.¹²

To state that ethical violations are the exception rather than the rule in Navy practice does not moot the question of how best to foster an ethical practice or ensure that attorneys are held accountable for ethics violations against the backdrop of a robust ethics education program. This is particularly so because, as noted below, one of the Navy's—and the military's—own brand of ethical issues¹³ stems from the dizzying array of jurisdictions and authorities to which an attorney may be subject and whose rules she may be responsible for knowing and properly applying.

In seeking to identify the best practices in ethics education, this article proceeds in three sections. Following this introduction, Section II discusses authorities delineating Navy judge advocates' professional responsibilities and the problem of conflicting authorities. Section III tackles ethical scenarios confronted by judge advocates including the case of *United States v. Hutchins*.¹⁴ Section IV proposed a form of additional training that might be most useful.

II. Governing Authority

A. JAG Instruction 5803.1C

Since 1908, the American Bar Association has made several attempts to formulate ethics rules governing the practice of law, from its adoption of the Canons of Professional Ethics in 1908¹⁵ to its adoption of the Model Rules of

⁸ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL NOTICE 5803, LIST OF ATTORNEYS PROFESSIONALLY DISCIPLINED BY THE JUDGE ADVOCATE GENERAL OF THE NAVY encl. (1) (31 Aug. 2009).

⁹ *Id.*

¹⁰ Code 134, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ Rose, *supra* note 4.

¹⁴ *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010), *reversed and remanded*, 69 M.J. 282 (C.A.A.F. 2011).

¹⁵ CANONS OF PROF'L ETHICS (1908).

Professional Conduct in 1983¹⁶ and subsequent revisions of the Model Rules.¹⁷ Different jurisdictions have followed the ABA's guidance to varying degrees. Only in November 1987 did the Navy adopt a modified version of the ABA's Model Rules, thirty-seven years following the establishment of the JAG Corps within the Department of the Navy.¹⁸ The most recent version of the Navy's Rules of Professional Conduct is contained in U.S. Navy Judge Advocate General Instruction 5803.1C.¹⁹ This instruction also sets forth procedures applicable to complaints of professional misconduct made against attorneys practicing under the supervision of the Judge Advocate General and procedures applicable to processing requests to engage in the outside practice of law.²⁰

There are several points worth noting about the Navy's Rules of Professional Conduct. First, note the general statement of policy contained in the instruction:

Covered attorneys shall maintain the highest standard of professional ethical conduct. Loyalty and fidelity to the United States, to the law, to clients both institutional and individual, and to the rules and principles of professional ethical conduct . . . must come before private gain or personal interest.²¹

Second, while the Rules do not apply to non-attorneys such as Navy legalmen, the Rules "shall serve as models of ethical conduct" for those personnel, and a covered attorney supervising those personnel shall be responsible for their ethical conduct.²² Third, the "client" is the Department of the Navy unless the attorney is "detailed to represent another client by competent authority."²³ Indeed, covered attorneys are prohibited from establishing attorney-client relationships "with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority" and may be disciplined for wrongfully establishing an attorney-client relationship.²⁴ Finally, as will be discussed further below,²⁵ the Navy's Rules of Professional Conduct state that

¹⁶ MODEL RULES OF PROF'L CONDUCT (1983).

¹⁷ *Id.*; see also C. Peter Dungan, *Avoiding "Catch-22s": Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, J. LEGAL PROF., Spring 2006, at 31, 36.

¹⁸ *Id.*

¹⁹ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5803.1C (9 Nov. 2004) [hereinafter JAGINST 5803.1C].

²⁰ *Id.*

²¹ *Id.* para. 5(a).

²² *Id.* para. 4(d) & encl. (1), R. 5.3.

²³ *Id.* para. 6(a).

²⁴ *Id.* para. 6(a) and (b).

²⁵ See discussion *infra* Part II.C.

they supercede any other jurisdiction's rules to which a covered attorney may be subject.²⁶

B. Other Sources of Authority

Navy judge advocates are of course subject to the authority of their individual state licensing authorities and possibly the rules of professional responsibility adopted in those states.²⁷ A Navy judge advocate may further be subject to distinct rules of professional responsibility by virtue of their current assignment.²⁸ For example, attorneys assigned to the Department of Defense Office of Military Commissions (OMC) are subject to applicable Department of Defense professional responsibility rules.²⁹

Thus, for example, in a formal advisory opinion, the Navy's Professional Responsibility Committee relied largely upon rules of professional responsibility applicable to the OMC in determining the ethical duties of a detailed defense counsel to his client, a detainee at Guantanamo Bay, Cuba, who was refusing representation before a Military Commission.³⁰ Under the Navy Rules of Professional Responsibility, an attorney must withdraw from representation when dismissed by his client.³¹ The comments to the Rules, however, further state that “[w]hether a client can discharge an appointed covered USG [U.S. Government] attorney may depend on applicable law or regulation.”³² The Professional Responsibility Committee³³ noted that OMC rules and regulations require that an accused before the Military Commissions must be represented by detailed defense counsel at all times, notwithstanding the desires of the accused, and concluded that the attorney must continue representation.³⁴ Indeed, the Committee concluded that the attorney must

²⁶ *Id.* para. 8(a).

²⁷ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.5 (1983). Forty-nine states (not California) have adopted a version of the MODEL RULES. Center for Professional Responsibility, *Alphabetical List of States Adopting Model Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Feb. 28, 2012).

²⁸ *Id.*

²⁹ U.S. DEP'T OF DEF., APPOINTING AUTHORITY REG. 3, PROFESSIONAL RESPONSIBILITY para. 3.A. (Nov. 17, 2004); MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, R.M.C. 109 (2010); JAGINST 5803.1C, *supra* note 19, para. 8(b).

³⁰ Formal Advisory Opinion 1-06, Op. Prof'l Resp. Comm., OJAG, Navy, 02/No. 027 (15 May 2006) [hereinafter Opinion 1-06].

³¹ JAGINST 5803.1C, *supra* note 19, encl. (1), R. 1.16(a)(3).

³² *Id.* cmt. (3)(b).

³³ Opinion 1-06, *supra* note 30, at 4.

³⁴ U.S. DEP'T OF DEF., MILITARY COMMISSION ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERROR para. 4.C.(4) (Mar. 21, 2002).

continue representation notwithstanding the client's refusal to communicate with the attorney.³⁵

Similarly, attorneys assigned to Naval Legal Service Offices (NLSOs) or Region Legal Service Offices (RLSOs) may need to consult the Naval Legal Service Command (NLSC) Manual³⁶ or the Manual of the Judge Advocate General for further clarification regarding their professional responsibilities.³⁷ Attorneys serving as Special Assistant United States Attorneys may need to consult Department of Justice rules of professional responsibility as well as local rules of court.³⁸

C. Conflict of Authority

What happens when an attorney is subject to the professional responsibility rules of more than one jurisdiction and they conflict? As noted above, all judge advocates are subject to both the Navy's Rules and the rules of their respective state bars. The Navy's Rules specifically provide that they take precedence in the event of any conflict.³⁹ This order of precedence has prompted at least one commentator to observe:

Because of the nature of military authority, that conduct which is legally permissible under military ethics rules may also be ordered by military authorities. The potential clash between military and civilian rules is intensified by the provision in military rules that the military rules take precedence over civilian rules in all cases of conflict. These conflicting requirements may create an unfair "Catch-22" for the military lawyer who is simply trying to do her job and serve her country.⁴⁰

³⁵ *Id.*; compare *Authority to Represent [Sailor] at a Board of Inquiry When No Attorney-Client Relationship Has Been Established*, Op. Rules Counsel, OJAG, Navy, 13/No. 4PR12559.09 (30 Nov. 2009) (advising an attorney that he could not represent a servicemember at his board of inquiry, despite the attorneys being detailed to the case, when the servicemember was in an unauthorized absence status and counsel had been unable to communicate with him).

³⁶ U.S. DEP'T OF NAVY, COMMANDER, NAVAL LEGAL SERVICE COMMAND INSTR. 5800.1F (6 Oct. 2010) [hereinafter JAGINST 5800.1F]. In general, NLSOs provide legal services, such as legal assistance and defense representation in courts-martial, to individual servicemembers. *Id.* para. 0300. RLSOs provide legal services to the U.S. Navy. *Id.* para. 0301.

³⁷ U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7E (20 June 2007) (C1, 5 May 2008 & C2, 16 Sep. 2008).

³⁸ 28 U.S.C. § 530B (2006 & Supp. IV 2010); 28 C.F.R. pt. 77 (2011).

³⁹ JAGINST 5803.1C, *supra* note 19, para. 8(a).

⁴⁰ Dungan, *supra* note 17, at 34–35.

For example, the Navy Rules of Professional Responsibility prohibit a covered attorney from offering to a court evidence that the attorney knows to be false.⁴¹ Thus, under the Navy Rules, if a client testifies falsely in court, a covered attorney must disclose the client's deception to the court if he cannot convince the client to correct the perjured testimony.⁴² Yet, state ethics rules may require a different course of action from the attorney. The District of Columbia's (D.C.) Rules of Professional Conduct provide:

When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.⁴³

The D.C. Bar has indicated in a formal ethics opinion that the lawyer is not permitted under this jurisdiction's ethics rules to inform the judge that his client has testified falsely, although it may be clear to the judge and prosecutor by virtue of the attorney's mode of presenting his client's false testimony.⁴⁴ Thus, a Navy judge advocate who is also a member of the D.C. Bar will face a dilemma should his client insist upon testifying falsely in a court-martial. While some state bars have held that military attorneys faithfully following military rules of professional responsibility will not be prosecuted for violating state ethics rules, others have insisted upon the precedence of the state ethics rules.⁴⁵

D. Sources of Advice

In navigating the minefield of potential ethical issues, including determining the applicable standard, a Navy judge advocate is not alone. The Navy's standing Professional Responsibility Committee is authorized upon

⁴¹ JAGINST 5803.1C, *supra* note 19, encl. (1), R. 3.3(a)(4).

⁴² *Id.* cmts. 3(c), (4) & (5).

⁴³ D.C. RULES OF PROF'L CONDUCT R. 3.3(b) (2007).

⁴⁴ Defense Counsel's Duties When Client Insists on Testifying Falsely, Op. D.C. Bar Legal Ethics Comm. No. 234 (Mar. 8, 1993).

⁴⁵ Dungan, *supra* note 17, at 34 n.11.

written request “to provide formal advisory opinions to covered attorneys about the propriety of proposed courses of action under the Rules.”⁴⁶ The covered attorney who follows the opinion is then protected from adverse action provided there was full disclosure of all relevant facts.⁴⁷ Moreover, covered attorneys may seek informal ethics advice from certain designated officers or their supervisory attorneys in the field.⁴⁸ When reasonably relied upon, such advice obtained in writing following full disclosure of all relevant facts will also provide protection against adverse action.⁴⁹

The attorney is not limited to one source of advice and would frequently benefit from consulting as many sources as possible, consistent with client confidentiality. One notable example is the previously mentioned case of the judge advocate seeking advice from the Professional Responsibility Committee concerning his representation before the Military Commissions of his recalcitrant client in Guantanamo Bay.⁵⁰ This judge advocate had received advice from his supervisory attorney that he should boycott the proceedings if his client so instructed.⁵¹ The Professional Responsibility Committee unanimously disagreed and so advised in writing.⁵² It is worthwhile asking whether, even assuming he had received the advice from his supervisor in writing, the judge advocate would have been found to have “reasonably relied upon” the advice had he boycotted the Commissions at his client’s request.⁵³

When the issue is a “[s]pecific and significant instance of conflict” between different jurisdictions’ rules of professional responsibility, not only may an attorney seek guidance, but he must seek guidance.⁵⁴ Such conflicts between the Navy’s Rules and the rules of other jurisdictions must be reported to the Rules Counsel via the attorney’s supervisory attorney.⁵⁵ In determining whether the conflict is indeed “specific and significant,” the attorney will also want to contact his state bar.

Sources of guidance, however, are of no avail if the attorney does not recognize that an ethical issue has arisen. The importance of continuing ethics

⁴⁶ JAGINST 5803.1C, *supra* note 19, para. 10(b)(3).

⁴⁷ *Id.*

⁴⁸ *Id.* para. 12.

⁴⁹ *Id.*

⁵⁰ See *supra* notes 30–35 and accompanying text.

⁵¹ Opinion 1-06, *supra* note 30.

⁵² *Id.*

⁵³ JAGINST 5803.1C, *supra* note 19, para. 12.

⁵⁴ *Id.* para. 8(a).

⁵⁵ *Id.*

education is that “ethics issues do not announce themselves; a lawyer must be sensitive and knowledgeable enough to notice them when they arise.”⁵⁶

III. Identifying Ethical Dilemmas

A. *United States v. Hutchins*

The case of *United States v. Hutchins*⁵⁷ is perhaps a good example of an ethics issue that clearly did not announce itself to any of the attorneys involved—defense counsel, trial counsel, supervisory attorneys, or even the military judge.

The appellant was charged and found guilty of conspiracy and murder in connection with the death of an Iraqi man in Hamdaniyah, Iraq in April 2006.⁵⁸ Lieutenant Colonel Smith, USMC and Captain (Capt) G. Bass, USMC were detailed to the appellant as military defense counsel in July 2006.⁵⁹ The accused was also represented by civilian defense counsel. On 13 August 2006, Capt Bass submitted a request to resign his commission effective 1 July 2007.⁶⁰ He did not inform the appellant that he would be leaving active duty until May 2007 and did not meet with the appellant again after communicating his departure.⁶¹ Neither Capt Bass nor anyone else ever informed the accused of the option of requesting Capt Bass’ continuation on active duty to represent him at trial.⁶² While Capt Bass consulted with the Regional Defense Counsel regarding his imminent departure from active duty,⁶³ Capt Bass neither obtained the client’s consent to his withdrawal as counsel, nor submitted a motion to the court seeking to withdraw.⁶⁴

The appellant was arraigned on 7 December 2006.⁶⁵ Capt Bass commenced his terminal leave on 25 May 2007,⁶⁶ and the record does not reflect that Capt Bass conducted turn-over with either his replacement counsel or the lead defense counsel.⁶⁷ The military judge was only informed of Capt Bass’ impending release from active duty by virtue of a defense motion for a

⁵⁶ Green, *supra* note 2, at 1117.

⁵⁷ United States v. Hutchins, 68 M.J. 623 (N-M. Ct. Crim. App. 2010), *reversed and remanded*, 69 M.J. 282 (C.A.A.F. 2011).

⁵⁸ *Id.* at 624–25.

⁵⁹ *Id.* at 625.

⁶⁰ *Id.* at 625–26.

⁶¹ *Id.* at 626.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 625.

⁶⁶ *Id.*

⁶⁷ *Id.* at 630.

continuance, citing as a basis Capt Bass' departure from active duty and the need of his replacement counsel for additional time to prepare for trial.⁶⁸ Finally, on 11 June 2007, during a session under Article 39a, UCMJ, neither defense counsel nor trial counsel could clearly articulate Capt Bass' current status.⁶⁹ In any event, the military judge informed the accused that, because Capt Bass was leaving active duty, the Marine Corps could not retain him on the defense team.⁷⁰

Noting that "the right to effective assistance of counsel and to the continuation of an established attorney-client relationship is fundamental in the military justice system,"⁷¹ the Navy-Marine Corps Court of Criminal Appeals concluded that there was no good cause justifying severance of the attorney-client relationship absent the client's consent.⁷² Moreover, the court rejected any contention that the accused consented to the termination of the attorney-client relationship in light of the characterization of the situation to him as a *fait accompli* by both defense counsel and the military judge.⁷³ The court's observations are worth repeating here:

The multiple errors and inattention leading to deprivation of counsel in this case reflect something of a perfect storm. . . . [T]he defense team as a whole, and Capt Bass in particular, consistently failed to provide the appellant with proper legal advice regarding the appellant's very real option to actively contest Capt Bass' pending departure from active duty and from the defense team. The military judge's approach compounded the defense team's errors by cementing and validating the appellant's misperception of his rights and options. . . . The ambiguous facts surrounding Capt Bass' departure and his actual duty status, plus the military judge's unclear explanation of the appellant's legal rights to have all his counsel present, should have prompted a vigilant Government counsel to ameliorate this situation by requesting the military judge to affirmatively determine the status of Capt Bass and appellant's desire for representation irrespective of Capt Bass' pending release from active duty. In this regard, we observe this issue could have been avoided altogether had Capt Bass'

⁶⁸ *Id.* at 626.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 627.

⁷² *Id.* at 628.

⁷³ *Id.* at 627–28.

supervisory attorney, or his Officer in Charge at Miramar, or the Officer in Charge of LSSS at Camp Pendleton, formally confirmed that the appellant had properly released Capt Bass, or that the military judge had made a good cause ruling before they allowed Capt Bass to commence terminal leave or be separated from the Marine Corps.⁷⁴

In writing for the court, Senior Judge Geiser did not directly address the ethical implications of this case,⁷⁵ but it is worthwhile to examine the applicable rules of professional responsibility delineating the responsibilities of each of the attorneys in this perfect storm. Rule 1.16(b) provides that an attorney may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client or if good cause exists for withdrawal.⁷⁶ Moreover, upon termination of representation, the attorney must take all necessary steps to protect the client's interests, including appropriate turnover with substitute counsel.⁷⁷ Subsection (c) further provides that a tribunal or other competent authority may require continued representation notwithstanding good cause.⁷⁸ Comment (2) to the rule explains that, in any event, a detailed attorney must continue representation until properly relieved by competent authority.⁷⁹ The comment clarifies that, in the case of courts-martial, the original detailing authority is competent authority "prior to trial" and the military judge is the competent authority once trial begins.⁸⁰ Moreover, Rules 1.1 and 1.3, requiring competent and diligent representation of a client,⁸¹ would dictate reference to the Rules for Courts-Martial (RCM), which require, in essence, good cause shown on the record in the absence of the accused's consent or an application by defense counsel to the military judge for withdrawal.⁸² Interestingly, the comments to Rule 1.16 do state that good cause to "seek withdrawal exists when a covered attorney changes duty stations or changes duties within an office."⁸³ However, diligence would arguably further dictate reference to longstanding caselaw indicating that the severance of representation by a trial defense attorney requires something more.⁸⁴

⁷⁴ *Id.* at 629–30.

⁷⁵ *Id.* at 629 n.10.

⁷⁶ JAGINST 5803.1C, *supra* note 19, encl. (1).

⁷⁷ *Id.* R. 1.16(d) & cmt. (5).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 506(c) (2008).

⁸³ JAGINST 5803.1C, *supra* note 19, encl. (1).

⁸⁴ E.g., *United States v. Iverson*, 5 M.J. 440, 442–43 (C.M.A. 1978) (holding that the relationship between trial defense attorney and the accused cannot be severed for administrative convenience,

Certainly under Rule 5.1, Capt Bass' supervisors had an obligation to make reasonable efforts to ensure he was meeting his professional responsibilities consistent with the Navy's Rules.⁸⁵ Moreover, the trial counsel under Rule 3.8 had an obligation to ensure that the accused understood his right to counsel and was accorded procedural justice.⁸⁶ Finally, under the American Bar Association's Code of Judicial Conduct, the judge was responsible to ensure that he understood the standard applicable to termination of an ongoing attorney-client relationship.⁸⁷ As noted by Senior Judge Maksym in his concurrence in *Hutchins*, "Navy and Marine Corps judges have been endowed with the responsibility for the application of justice and, uniquely, the professional growth of the uniformed attorneys appearing before them. They are the last line of defense against the kind of ill-considered conduct that occurred during this case."⁸⁸

Most significantly for purposes of this article, it appears that none of the attorneys associated with the case—detailed defense counsel, Capt Bass, his supervisors, trial counsel, the military judge—engaged in a conversation about whether counsel's terminal leave or release from active duty constituted good cause under RCM 506 and whether it was consistent with both the accused's right to a continued attorney-client relationship and Capt Bass' professional responsibilities. In its oral argument before the Court of Appeals for the Armed Forces, the Government contended that the requirements of the Navy's Rules of Professional Responsibility are in conflict with the RCM on this issue, and the former possesses no binding authority in this case.⁸⁹ Considering this startling proposition on appeal and the apparent failure of any party to the case to recognize the existence of the issue at trial, it is reasonable to ask to what extent the backdrop of a vigorous program of ethics training of the kind proposed in this article might prompt the necessary discussions in future cases.

including routine changes of assignment, as the applicable standard requires "truly extraordinary circumstances rendering virtually impossible the continuation of the established relationship").

⁸⁵ JAGINST 5803.1C, *supra* note 19, encl. (1).

⁸⁶ *Id.*

⁸⁷ MODEL CODE OF JUDICIAL CONDUCT R. 2.5 (2007).

⁸⁸ United States v. Hutchins, 68 M.J. 623, 633 (N-M. Ct. Crim. App. 2010) (Maksym, Senior J., concurring), *reversed and remanded*, 69 M.J. 282 (C.A.A.F. 2011).

⁸⁹ Oral Argument at 4:10, United States v. Hutchins, 69 M.J. 282 (C.A.A.F. 2011) (No. 10-5003), available at <http://www.armfor.uscourts.gov/newcaaf/CourtAudio2/20101013b.wma>. The Court of Appeals for the Armed Forces reviewed *Hutchins*, agreeing with the lower court's assessment that Capt Bass failed to properly terminate the attorney-client relationship but disagreeing with the lower court's presumption that prejudice flowed from the error. 69 M.J. at 293.

B. Additional Scenarios

“Comings and goings are facts of military life.”⁹⁰ Accordingly, a fact of military life as a trial defense counsel is that transfers between commands and even one’s release from active duty and commencement of civilian employment may be disrupted by one’s professional responsibilities to one’s client. The comments to Rule 1.7 are clear: “A covered attorney’s own interests should not be permitted to have an adverse affect on representation of a client.” Notably, the comings and goings of military life do not solely impact trial defense counsel.

In *United States v. Golston*,⁹¹ one of the prosecutors had previously represented the accused’s wife as a legal assistance attorney in an unrelated matter. As a result of his representation, the trial counsel was aware of information that could be used to impeach the accused’s wife.⁹² The accused’s wife was listed as a witness for the accused. The trial counsel segregated himself from any portion of the case involving the accused’s wife, including tasking assistant trial counsel with the cross-examination of his former client, and did not divulge any information to the other trial counsel concerning his representation of the accused’s wife, including the information relevant to impeachment.⁹³ However, he also did not divulge the potential conflict to the military judge.⁹⁴ Rather, the appellant’s wife recognized trial counsel during her testimony and informed defense counsel who then made a motion for mistrial or, in the alternative, to strike the cross-examination testimony of the accused’s wife.⁹⁵ After questioning trial counsel and assistant trial counsel, the military judge denied the defense’s motion.⁹⁶

The appellate court concluded that the trial counsel’s prior representation of the accused’s wife did not preclude him from prosecuting the accused in an unrelated case and that the trial counsel did not divulge any confidential information from his representation of the accused’s wife.⁹⁷ However, the court noted that the trial counsel had certified at the commencement of the trial that no member of the prosecution had acted in any manner that might tend to disqualify him and concluded that the trial counsel had an ongoing duty to apprise the military judge of any developments that might call into question his ability to serve as trial counsel, such as the discovery

⁹⁰ 68 M.J. at 633 (Booker, Senior J., concurring).

⁹¹ *United States v. Golston*, 53 M.J. 61, 63 (C.A.A.F. 2000).

⁹² *Id.* at 62–63.

⁹³ *Id.* at 63.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 64–66.

that a former legal assistance client would be testifying on behalf of the accused.⁹⁸ While declining to find prejudice, the court concluded, “[T]rial counsel failed in this duty to avoid even the appearance of wrongdoing in the area of attorney-client relationships.”⁹⁹ The concurring judge addressed the trial counsel’s lapse in stronger terms:

When trial counsel discovered that he had previously represented [the accused’s wife] . . . and disclosed that fact to assistant trial counsel, both officers had an ethical duty to disclose the conflict of interest to the military judge immediately, and not wait for two more weeks until [the accused’s wife] raised the issue in the middle of this trial. Both officers had a duty to “avoid the very appearance of that wrongdoing which, in obedience to the important policy dictating [the attorney-client] relationship, the courts are impelled to deplore . . .”¹⁰⁰

In *Golston*, the trial counsel understood that he was facing an ethical issue. He apparently understood that he owed a duty of loyalty to former clients under Rule 1.9, including avoiding using any information relating to the representation of his former client to the disadvantage of that client or otherwise disclosing information relating to the representation. There is no indication, however, whether he discussed the appropriate manner of resolving the possible conflict with any supervisory attorney. Clearly, he was unaware of any ethical obligation to apprise the court of the possible conflict of interest.¹⁰¹ Nor, apparently, did he consider whether, as the concurring judge opined, his conflict might be imputed to his assistant trial counsel if both attorneys were viewed as part of a “prosecution team” in the case.¹⁰² Further, we cannot know whether he consulted the ethical rules of the state in which he was licensed, which may have had a much more narrow view of imputation of conflicts than that adopted necessarily by the military. It may be that, here, as in *Hutchins*, counsel had not learned the habit of “talking out” ethical issues arising during the course of his practice.

What of imputed disqualification of counsel working in the same office? Rule 1.10 clearly provides that “[c]overed USG attorneys working in the

⁹⁸ *Id.* at 66.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 67 (quoting United States v. McCluskey, 20 C.M.R. 261, 266 (C.M.A. 1955)).

¹⁰¹ *Id.* at 66 (citing United States v. Breese, 11 M.J. 17, 20 (C.M.A. 1981)). The general rule governing conflicts of interest specifically states: “[R]esolving questions of conflict of interest involving covered USG attorneys is primarily the responsibility of the supervisory attorney or the military judge.” JAGINST 5803.1C, *supra* note 19, encl. (1), R. 1.7, cmt. 9.

¹⁰² *Golston*, 53 M.J. at 67.

same military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so.”¹⁰³ Comment (2) to the rule further states that imputed disqualification “requires a functional analysis of the facts in a specific situation.”¹⁰⁴ Thus, an analysis of, for example, defense attorneys in the same office representing conflicted clients would likely focus on the procedures utilized in that office to protect against disclosure of confidential information. Are there formal, specific written procedures in place to protect against such disclosure? While such written procedures may not be a prerequisite to avoiding imputation of conflicts in the military or in government offices generally, the comments to the ABA’s Model Rules are instructive. They observe that while conflicts are not necessarily imputed to attorneys associated together in government offices, “ordinarily it will be prudent to screen such lawyers.”¹⁰⁵ Moreover, a state ethics rule may be more stringent.¹⁰⁶ This should be a topic of ongoing training and conversation in defense shops.

What of inadvertent disclosures? With relaxed standards of imputation come more stringent standards governing inadvertent exposure to confidential information. Comment (4) to Rule 1.10 provides:

A covered attorney who mistakenly receives any such confidential or privileged materials should refrain from reviewing them . . . , notify the attorney to whom the material belongs that he or she has such material, and either follow instructions of the attorney with respect to disposition of the materials or refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court.¹⁰⁷

Yet, attorneys who are licensed in Massachusetts should be aware of its Bar’s ethics opinion advising that, if they believe it to be in their own client’s best interest and consistent with their obligation to zealously represent their client, they should resist the return of inadvertently obtained confidential information.¹⁰⁸

¹⁰³ JAGINST 5803.1C, *supra* note 19, encl. (1).

¹⁰⁴ *Id.*

¹⁰⁵ MODEL RULES OF PROF’L CONDUCT R. 1.11 cmt. (2) (1983).

¹⁰⁶ See, e.g., HAW. RULES OF PROF’L CONDUCT R. 1.10(d) (1994) (stating that conflicts are not imputed to a government attorney provided the attorney is screened from participation in the matter).

¹⁰⁷ JAGINST 5803.1C, *supra* note 19, encl. (1).

¹⁰⁸ Op. Mass. Bar Ass’n Comm. on Prof’l Ethics 99-4 (1999).

Neither this article nor any ethical training could exhaust the possible ethical conundrums that can present themselves to judge advocates during the course of their practice. However, fostering conversations about ethics may encourage judge advocates to recognize ethical issues even when those issues do not announce themselves and thereby avoid the types of problems that arose in *Hutchins*¹⁰⁹ and *Golston*.¹¹⁰ Fostering such conversations may encourage judge advocates to examine their chartered course more closely and ask, for example: whether a glance at the Navy's Rules is sufficient or whether additional research is required; which rules of professional responsibility are applicable; whether applicable rules are consistent; whether consultation with a supervisory attorney or military judge is necessary; and whether personal interests, such as an interest in transfer or departure from active duty, have impaired the attorney's loyalty to his client.

IV. Teaching Ethics

A. Why the JAG Corps Needs a New Method

The question then is how can the JAG Corps foster such conversations? Training provided at the initiation of one's service fades quickly to a dim memory, a deficit ostensibly addressed by the Professional Responsibility Certification Course.¹¹¹ That course seeks to utilize the "problem method" of teaching and cover major principles set forth in the Navy's Rules of Professional Responsibility. However, I would submit that the one-dimensional nature of the online training and its brevity limit its utility. The problem is presented, as is the solution. There is no opportunity for the attorney to propose a solution without prompting. There is no opportunity to discuss whether the official answer would be correct in other conceivable factual scenarios. There is no ability to discuss the myriad of additional questions raised by the original problem. Similarly, lectures on professional responsibility, even when the instructor solicits input or questions from the audience, tend to devolve into a one-sided delivery of information to a passive audience.

One teacher of legal ethics has explained his preference for engaging lawyers in group discussion through the use of short problems that are either wholly fabricated or based on actual cases.¹¹²

¹⁰⁹ *United States v. Hutchins*, 68 M.J. 623 (N.M. Ct. Crim. App. 2010), *reversed and remanded*, 69 M.J. 282 (C.A.A.F. 2011).

¹¹⁰ *United States v. Golston*, 53 M.J. 61, 63 (C.A.A.F. 2000).

¹¹¹ See *supra* note 3 and accompanying text.

¹¹² Green, *supra* note 2, at 1099.

[I]nteractive programs undertake to sharpen participants' ability to identify ethics issues and develop their facility for resolving such issues. Asking lawyers to imagine themselves in a situation that raises ethics dilemmas, challenging them to identify the issues and to propose how to resolve them, and inviting them to assess each others' proposed resolutions are . . . tailored to further these goals. . . . Engaging [attorneys] . . . in conversation also enables the instructor to tailor the program to the attendees' level of knowledge and to their specific interests, as well as to identify and correct some of their misunderstandings.¹¹³

The JAG Corps use of a small group discussion method would allow it to more readily meet the goals of providing vigorous ethics education, honing attorneys' and support personnel's abilities to identify ethical issues, and encouraging full discussion of ethical issues as they arise to ensure the best resolution.

B. A New Way Ahead

The Navy JAG Corps should require at a minimum annual, in-person ethics training of at least one full day's duration utilizing both the problem method and group discussion. Ideally, the training would be given to small discussion groups of not more than ten or fifteen individuals to ensure each person's full participation. The training would include not only judge advocates but also legalmen and other non-lawyers who work under their supervision.

The Naval Justice School in collaboration with the Administrative Law Division at the Office of the Judge Advocate General could work together every year to create ten or more ethical scenarios each for designated areas of practice such as military justice, command services, and operational law. The scenarios would involve more than the Navy's Rules of Professional Responsibility, reflecting also new developments in ethics law, whether in military, federal, or state practice. The scenarios would be designed to highlight differences between the Navy's Rules and those of other jurisdictions, encouraging attorneys to check the Navy's Rules, those of their own licensing authority, and those of any other applicable jurisdiction when confronted with ethical issues. The scenarios could also be modeled on filed complaints, to the extent consistent with privacy, or the actual experiences of judge advocates in the field. In this regard, the authors of the scenarios could solicit input from judge advocates in the field leading up to the issuance of the training itself. The scenarios, whatever their number, would be designed to elicit a full day of

¹¹³ *Id.* at 1100.

discussion. Along with the scenarios, the Naval Justice School and the Administrative Law Division would create an answer key that would outline the issues to be spotted in connection with each scenario, appropriate resolutions of the issues, and any relevant rules and case law.

The training should be led by personnel from Naval Justice School and the Administrative Law Division or, alternatively, by designated discussion leaders in the field. The benefit of the former approach would be the use of more knowledgeable instructors specializing in the field of ethics who could more fully address the ambiguities that so frequently characterize ethical issues and that may not be anticipated by an answer key. The value of the proposed training would likely be diminished to some degree unless led by instructors armed with significant knowledge of ethics.

Given the magnitude of the task, however, a more realistic approach—and one that still offers an improvement over current training requirements—may be the administration of the training in the field. This likely would be done most easily by NLSC commands.¹¹⁴ Each Department within a NLSO or RLSO¹¹⁵ could be responsible for designating a discussion leader to manage the logistics of scheduling the training and also guide the group discussion of the scenarios. The discussion leader would have not only the scenarios but also the answer key to assist her in conducting the training. To keep the discussion groups small, the discussion leader may be required to conduct multiple training sessions or designate deputy discussion leaders. The logistics of the training may also depend upon the geographic distribution of a command. For those outside NLSC, the logistics of the training could prove more challenging. Naval Justice School and the Administrative Law Division could examine those judge advocates outside the NLSC community and perhaps create discussion groups based upon geographical location and area of practice. These discussion groups may require utilization of remote means of communication such as telephone or video teleconference. Again, a single discussion leader would be designated to manage the logistics of scheduling the training and also guide the group discussion of the scenarios.

The goal of this training would be to ensure attorneys and their supporting staff “recognize when an ethical concern is approaching (or has already arrived),”¹¹⁶ discuss the issue with the appropriate supervisory attorneys,

¹¹⁴ JAGINST 5800.1F, *supra* note 36, para. 0200 (describing the NLSC command structure).

¹¹⁵ See *supra* note 36 and accompanying text.

¹¹⁶ Denny, *supra* note 5.

and, thus, resolve the issue. The deafening silence in *Hutchins* should teach us that just talking about ethics can be half the battle.¹¹⁷

¹¹⁷ United States v. Hutchins, 68 M.J. 623 (N-M. Ct. Crim. App. 2010), *reversed and remanded*, 69 M.J. 282 (C.A.A.F. 2011).

THE EMERGENCY ALTERNATIVE ARRANGEMENT EXCEPTION TO THE NATIONAL ENVIRONMENTAL POLICY ACT: WHAT CONSTITUTES AN EMERGENCY? SHOULD THE NAVY PIN ITS HOPES ON NOAH WEBSTER?

Commander Margaret Ann Larrea, JAGC, USN*

“Laws are silent in the time of war.”¹

I. Introduction

The world has come a long way from Ancient Rome, but today the proposition still lingers. When does the interest of national security trump environmental laws? When can a federal agency such as a branch of the armed forces say, “Yes, we agree that protection of the environment is important, but what we have to do *right now* is more important”? How urgent is urgent? Or more basically, when is an emergency, an “emergency”?

In 1969, the National Environmental Policy Act (NEPA)² was enacted to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.”³ NEPA is essentially a procedural mechanism to force

* Commander Larrea is a member of the Judge Advocate General’s Corps, U.S. Navy. She is presently assigned as the Executive Officer, Naval Legal Service Office Mid-Atlantic. She earned a bachelor of science degree at Texas Christian University in 1988, a doctor of jurisprudence degree at DePaul University College of Law in 1996, and a master of laws degree at The George Washington University Law School in 2009. She is licensed to practice law in the State of Illinois. This thesis was submitted to the faculty of The George Washington University Law School in partial satisfaction of the requirements for the master of laws degree. The views expressed herein are solely those of the author and do not reflect the official positions of the Department of Defense (DOD) or the Department of the Navy.

¹ Marcus Tullius Cicero, Pro Milone [Defense of Milo] (April 10, 52 B.C.), in SELECT ORATIONS OF CICERO 169, 175 (James Bradstreet Greenough & George Lyman Kittredge eds., Boston, Ginn & Co. 1896) (stating in the original Latin “[s]ilent enim leges inter arma . . .”).

² 42 U.S.C. §§ 4321–4375 (2006 & Supp. IV 2010).

³ *Id.* § 4321.

federal agencies to consider the environmental impacts of their proposed actions.

There are no exceptions in the Act. The regulations implementing NEPA, however, do have an emergency exception. Section 1506.11 of title 40 of the *Code of Federal Regulations* states:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council [on Environmental Quality] about alternate arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency.⁴

While this exception has not been used very often,⁵ it was central to the U.S. Navy's position in the case of *Winter v. Natural Resources Defense Council, Inc.* (NRDC).⁶ In that case, the U.S. Navy, after consulting with the Council on Environmental Quality (CEQ) and getting its approval, claimed the emergency exception as to why the Navy did not prepare an environmental impact statement (EIS) before conducting a series of training exercises in the Pacific Ocean off the southern California coast.⁷ These exercises use mid-frequency active sonar (MFA), which the President of the United States has determined is "essential to national security."⁸ NRDC, along with various other groups, claimed that MFA harms marine animals and that an EIS was required.⁹ They sought from and were granted a preliminary injunction by the U.S. District Court for the Central District of California. The district court's action was affirmed by the Ninth Circuit.¹⁰ The Supreme Court reversed the lower court and vacated the preliminary injunction to the extent of the Navy's challenge to

⁴ 40 C.F.R. § 1506.11 (2011).

⁵ See KRISTINA ALEXANDER, CONG. RESEARCH SERV., RL34403, WHALES AND SONAR: ENVIRONMENTAL EXEMPTIONS FOR THE NAVY'S MID-FREQUENCY ACTIVE SONAR TRAINING PROGRAM 4 (2009) (stating that the exception has been requested of the CEQ only forty-one times).

⁶ *Winter v. Natural Res. Def. Council, Inc.* (NRDC), 555 U.S. 7 (2008), remanded to 560 F.3d 1027 (9th Cir. 2009). For simplicity, while the case was captioned *NRDC v. Winter* in the lower courts, when the Navy petitioned for certiorari, it was renamed *Winter v. NRDC*, and will hereinafter be referred to as such.

⁷ *Id.* at 7.

⁸ Press Release, U.S. Dep't of Def., Navy Granted Authority To Use Sonar In Training Off California (Jan. 16, 2008) (on file with author), available at <http://www.defense.gov/releases/release.aspx?releaseid=11622>.

⁹ *Winter*, 555 U.S. at 12.

¹⁰ *NRDC v. Winter*, 518 F.3d 658 (9th Cir. 2008), aff'g 530 F. Supp. 2d 1110 (C.D. Cal. 2008).

certain of its provisions.¹¹ The majority of the Court did not, however, reach an opinion as to the validity of the Navy's use of the emergency exception under 40 C.F.R. § 1506.11, leaving the question unanswered.

This paper will explore the emergency exception to NEPA under 40 C.F.R. § 1506.11, looking at situations in which it has been used, determining whether it was properly invoked by the Government in *Winter v. NRDC*, and hypothesizing as to its usefulness to the U.S. Navy in similar situations.

II. The National Environmental Policy Act

A. Purpose/History

NEPA was enacted in 1970 and was one of the first modern federal environmental statutes. It established environmental policies and goals and created the CEQ.¹² Rather than a regulatory statute, it is an informational one, requiring the Federal Government to prepare and make public information about the environmental effects of certain actions it is going to take and propose alternatives to such actions. The thought is that a better-informed decision-maker will improve the quality of its final decisions and that a better-informed public will keep the process honest.

Many members of Congress opposed NEPA and hoped to limit its applicability; the drafters sought to ensure uniform NEPA application.¹³ By delegating enforcement to the executive branch through the CEQ and the judicial branch through judicial review, the drafters hoped that the structure of the Act would block efforts to avoid NEPA's requirements.¹⁴

When enacted, the only similar precedent in existing federal legislation was the Full Employment Act of 1946, which declared a historic national policy on the management of the economy and established the Council of Economic Advisers.¹⁵ Senator Henry M. Jackson hoped that NEPA would provide "an equally important national policy for the management of America's future environment."¹⁶ "[I]t is my view that S. 1075 as passed by the Senate and now, as agreed upon by the conference committee, is the most important and far-

¹¹ *Winter*, 555 U.S. at 33.

¹² 42 U.S.C. § 4321 (2006 & Supp. IV 2010).

¹³ Aaron Ehrlich, *In Hidden Places: Congressional Legislation That Limits the Scope of the National Environmental Policy Act*, 13 HASTINGS W.-NW. J. ENVT'L. L. & POL'Y 285, 285 (2007).

¹⁴ H.R. REP. NO. 91-379, at 2754 (1969), noted in Ehrlich, *supra* note 13, at 285.

¹⁵ 115 CONG. REC. 40,416 (1969) (statement of Sen. Henry Jackson).

¹⁶ *Id.*

reaching environmental and conservation measure ever enacted by Congress.”¹⁷ Senator Jackson viewed NEPA as Congress’ declaration that the Federal Government will not intentionally initiate actions which will do irreparable harm to the land, air, and water that support all life on Earth.¹⁸ However, he also did not see NEPA as the total solution for the environmental problems plaguing the country at the time. “While the National Environmental Policy Act of 1969 is not a panacea, it is a starting point.”¹⁹ So important did Senator Jackson and the other drafters of the original Senate bill view the environment, the first draft of Senate Bill 1075 used the phrase “each person has a fundamental and inalienable right to a healthful environment” in its declaration of policy. However, that language did not survive the conference committee,²⁰ and the law as passed reads, “Each person should enjoy a healthful environment.”²¹ Senator Jackson was clear that if there are departures from the standard of excellence that the Act has as a goal, they should be exceptions, not the rule, and as exceptions, they must be justified in the light of public scrutiny.²²

Another big proponent of NEPA was Senator Gordon L. Allott. As he put it, by enacting NEPA: “Congress is not giving the American people something, rather the Congress is responding to the demands of the American people. In this case, government response cannot be too soon. We can only hope that it is not too late.”²³ He believed that “the environment is not the exclusive bailiwick of any committee of Congress nor department of Government” and that NEPA’s recognition of this gives NEPA its “strength, appropriateness, and timeliness.”²⁴

Senator Allott described the background of NEPA and its creation of the CEQ in his comments to the conference committee.

The concept of a high-level council on conservation, natural resources, and environment has had congressional expression for nearly a decade. It first found legislative support from a former chairman of the Senate Interior Committee, the late Senator Murray. In the 86th Congress, he introduced S. 2549, the Resources and Conservation Act, which would have established a high-level council of environmental advisors along with the first expression of a comprehensive

¹⁷ *Id.*

¹⁸ *Id.* at 40,416.

¹⁹ *Id.* at 40,417.

²⁰ *Id.* at 40,416.

²¹ 42 U.S.C. § 4331(c) (2006 & Supp. IV 2010).

²² 115 CONG. REC. 40,416.

²³ *Id.* at 40,422.

²⁴ *Id.* at 40,423.

environmental policy. . . Bills of similar purpose were also introduced in the 89th and 90th Congresses.²⁵

During the 91st Congress, three bills dealing with environmental policy and creation of new oversight institutions were introduced and referred to the Senate Interior Committee; these became Senate Bill 1075.²⁶ During this time, President Richard M. Nixon expressed concern over the degradation of the nation's environment and committed himself during his 1968 campaign to a policy of improving the environment. In a radio address he gave on 18 October 1968, he said: "The battle for the quality of the American environment is a battle against neglect, mismanagement, poor planning and a piecemeal approach to problems of natural resources."²⁷ It was against this backdrop that NEPA and the CEQ were created.

B. Policies

Section 4331 of NEPA outlines very broad national policies regarding the protection of the environment. The section states that it is the continuing responsibility of the Federal Government to use "all practicable means, consistent with other essential considerations of national policy" to improve and coordinate plans and programs.²⁸ It goes on to list six general goals, as generic as "attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."²⁹

NEPA section 4332 is key in driving federal agency action. To the "fullest extent possible," all federal agencies must include in their proposals for major federal actions that significantly affect the quality of the human environment, a detailed statement concerning the environmental impact.³⁰ These detailed statements must include any adverse environmental impacts that cannot be avoided, alternatives to the proposed action, analysis on the

²⁵ *Id.* at 40,422.

²⁶ *Id.* at 40,422.

²⁷ Richard Nixon, A Strategy of Quality: Conservation in the Seventies, Radio Address (Oct. 18, 1968), quoted in 115 CONG. REC. 40,422.

²⁸ 42 U.S.C. § 4331(b) (2006 & Supp. IV 2010).

²⁹ *Id.* The other five goals are to: "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; . . . (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." *Id.*

³⁰ 42 U.S.C. § 4332(c) (2006 & Supp. IV 2010).

relationship between short-term uses and maintenance and the enhancement of long-term productivity, and any irreversible commitment of resources.³¹ Prior to doing an environmental statement, the federal agency must consult with and get comments from any other federal agency that has jurisdiction or special expertise in any environmental impact involved. Copies of these comments are to go to the President, the CEQ, and the public.³²

C. Council on Environmental Quality

Section 4342 of NEPA created the CEQ as an advisor to the President on environmental issues.³³ The CEQ was to be composed of three members who are appointed by the President, by and with advice and consent of the Senate, and the President was to appoint one of the members as the Chairman.³⁴ Each member was to be “exceptionally well qualified” by way of his training, experience, and attainments to do the following: analyze and interpret environmental information and trends; appraise programs and activities of the Federal Government in light of NEPA’s established policies; be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interest of the country; and formulate and recommend national policies to promote the improvement of the quality of the environment.³⁵

However, the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2006 reduced the CEQ to a single member who serves as the Chairman.³⁶ The Environmental Quality Improvement Act of 1970 established responsibilities for the CEQ in addition to the duties and functions spelled out in section 4344 of NEPA.³⁷ The CEQ’s mission, as stated in its official website, is to coordinate federal environmental efforts and work closely with agencies and other White House offices in the development of environmental policies and initiatives.³⁸ The CEQ reports annually to the President on the state of the environment and overseas federal agency implementation of the EIS process, and the CEQ acts as a referee when agencies

³¹ *Id.*

³² *Id.*

³³ *Id.* § 4342.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Pub. L. 109-54, tit. III, 119 Stat. 499, 543 (2005).

³⁷ Pub. L. 91-224, tit. II, § 203, 84 Stat. 91, 114–15 (1970) (codified as amended at 42 U.S.C. § 4372 (2006 & Supp. IV 2010)).

³⁸ *Council on Environmental Quality—About*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/ceq/about> (last visited Mar. 4, 2012).

cannot agree on the adequacy of an EIS.³⁹ The Chairman serves as the principal environmental advisor to the President.⁴⁰

In 1977, President Jimmy Carter issued Executive Order 11,991 directing the CEQ to publish new regulations.⁴¹ This was in response to inconsistent application of NEPA's requirements by federal agencies in the early 1970s.⁴² In 1978, the CEQ issued regulations that forced compliance with the procedures of NEPA and encouraged uniformity in the preparation of EISs.⁴³

D. Process

The main tool in the NEPA process is an EIS, a very detailed report on the environmental impacts of—both positive and negative—and the alternatives to the proposed action. All federal agencies are required to go through this process whenever they propose any major federal action significantly affecting the quality of the human environment.⁴⁴ Courts have construed the term “major” in a number of different ways.⁴⁵ The CEQ’s regulations construe it together with “significantly” and say that if a proposed action has a significant environmental effect, it is subject to NEPA regardless of whether it is otherwise major or minor.⁴⁶ This interpretation essentially eliminates the word “major” from NEPA.⁴⁷ The regulations state that “major/significantly affecting” does not have precise criteria but should be considered on a case-by-case basis.⁴⁸

³⁹ *Id.*

⁴⁰ *Id.* Nancy Sutley is President Obama’s CEQ Chairman. Prior to the appointment, she was the Deputy Mayor for Energy and Environment for Los Angeles, and she holds a bachelor of arts degree from Cornell University and a master of public policy degree from Harvard University. *Council on Environmental Quality—Chair Nancy Sutley, WHITE HOUSE*, <http://www.whitehouse.gov/administration/eop/ceq/chair> (last visited Mar. 4, 2012).

⁴¹ Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977).

⁴² Robert Orsi, Comment, *Emergency Exceptions From NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481, 483 (1987).

⁴³ Council on Environmental Quality Final Regulations Implementing the Procedural Provisions of NEPA, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (codified as amended at 40 C.F.R. pts. 1500–1508 (2011)).

⁴⁴ 42 U.S.C. § 4332(c) (2006 & Supp. IV 2010).

⁴⁵ 1 ENVIRONMENTAL LAW PRACTICE GUIDE § 1.04[2][a] (Michael B. Gerrard et al. eds., 2008) [hereinafter ELPG].

⁴⁶ 40 C.F.R. § 1508.18 (“Major reinforces but does not have a meaning independent of significantly (§ 1508.27.”)).

⁴⁷ 1 ELPG, *supra* note 45, § 1.04[2][a]. A second approach construes “major” as a modifier of “federal,” which has the effect of placing actions that are marginally federal outside of NEPA’s scope. *District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980). A third approach construes “major” independently from either “significantly” or “federal.” *Minn. Pesticide Info. & Educ. Inc. v. Espy*, 29 F.3d 442, 443 (8th Cir. 1994). This approach requires a finding that a proposed action is both major and significant, but no court has ever found that an action with a significant effect is not subject to NEPA because it is minor. *Sugarloaf Citizens Ass’n v. Fed.*

“Federal action” includes not only actions by the Federal Government, but also federal authorization of actions by private parties and some federally funded activities.⁴⁹ “Actions” can be one of three types: proposals sufficiently concrete and definite;⁵⁰ inactions;⁵¹ or proposals for legislation by federal agencies.⁵² Lastly, “human environment” includes the natural and physical environment and the relationship of people with that environment. It does not include solely economic or social effects.⁵³

NEPA contains neither a citizen suit provision nor a provision authorizing civil penalties against agencies that fail to comply with its provisions.⁵⁴ The judicial avenue for the public is under the Administrative Procedure Act (APA), and the available remedy is injunctive relief.⁵⁵ The APA provides judicial review of final agency actions for which there is no adequate remedy in a court.⁵⁶ Courts can review both the decision not to do an EIS and the adequacy of an EIS under NEPA.⁵⁷ The standard of review is whether agency action or inaction was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.⁵⁸

E. Exemptions/Exceptions

Some have urged Congress to adopt emergency exemptions that prevent environmental laws from interfering with rescue and recovery efforts.⁵⁹ However, recent disasters such as 9/11 and Hurricane Katrina have shown that perhaps that is not necessary. After 9/11, some of the demolition, transport, and disposal operations that took place may have violated a variety of environmental laws. This was a large demolition project for which the law would require the

Energy Regulatory Comm'n, 959 F.2d 508, 513–14 (4th Cir. 1992); Goos v. ICC, 911 F.2d 1283, 1295–96 (8th Cir. 1990); NAACP v. Med. Center, Inc., 584 F.2d 619, 629 (3d Cir. 1978).

⁴⁸ 40 C.F.R. §§ 1508.3, 1508.8, 1508.27 (2011).

⁴⁹ 40 C.F.R. § 1502.4 (2011).

⁵⁰ See Kleppe v. Sierra Club, 427 U.S. 390 (1976).

⁵¹ 40 C.F.R. § 1508.18 (2011) (including “failure[s] to act” within the definition of “major federal action”). *But see* Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980).

⁵² 40 C.F.R. § 1508.23 (2011).

⁵³ 40 C.F.R. § 1508.14 (2011).

⁵⁴ 42 U.S.C. §§ 4321–4375 (2006 & Supp. IV 2010).

⁵⁵ 5 U.S.C. §§ 701–706 (2006 & Supp. IV 2010).

⁵⁶ *Id.* § 704. *But see infra* notes 98–99 and accompanying text.

⁵⁷ *See* Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 319 (1975).

⁵⁸ 5 U.S.C. § 706(2).

⁵⁹ Michael B. Gerrard, *Emergency Exemptions From Environmental Laws After Disasters*, NAT. RESOURCES & ENV'T, Spring 2006, at 10, 10.

preparation of an EIS—or at least an environmental assessment (EA)⁶⁰—and advance notice of asbestos removal, among other things.⁶¹ None of this was done,⁶² and no one objected—no environmental agency or advocacy group.⁶³

There is a New York law that gives the governor the right to temporarily suspend part of any state or local laws during a state disaster.⁶⁴ Related regulations exempt the following, among other things, from state review:

[E]mergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment.⁶⁵

The state courts have interpreted this provision broadly to include events such as prison overcrowding and homelessness.⁶⁶

On the federal side, when the Federal Emergency Management Agency (FEMA) declared on 11 September 2001 that New York City was a disaster area, certain exemptions from federal environmental laws were triggered.⁶⁷ Most notably, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),⁶⁸ the majority of federal “emergency” response actions were exempted from NEPA compliance.⁶⁹

“Emergency” means any occasion or instances for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and

⁶⁰ An EA is a concise public document that serves to: aid in determining whether an EIS is required, assist in NEPA compliance when an EIS is not required, or facilitate preparation of an EIS. 40 C.F.R. § 1508.9(a) (2011).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 11.

⁶⁴ N.Y. EXEC. LAW § 29-a (Consol. 2012).

⁶⁵ NEW YORK COMP. CODES R. & REGS. tit. 6, § 617.5(c)(33) (2012).

⁶⁶ See, e.g., Bd. of Visitors v. Coughlin, 453 N.E.2d 1085 (N.Y. 1983); Gerrard, *supra* note 59, at 11.

⁶⁷ Gerrard, *supra* note 59, at 11. Reconstruction after 9/11 did involve NEPA, and four EISs were completed. *Id.*

⁶⁸ 42 U.S.C. §§ 5121–5207 (2006 & Supp. IV 2010).

⁶⁹ *Id.* §§ 5159, 5192; Gerrard, *supra* note 59, at 11.

safety, or to lessen or avert the threat of a catastrophe in any part of the United States.⁷⁰

The existence of the Stafford Act and its nullification of NEPA requirements for federal actions in response to an “emergency” call into question the need and purpose behind 40 C.F.R. § 1506.11. However, most federal actions exempted from NEPA compliance under the Stafford Act arise in response to “major disaster[s].”⁷¹ This, along with the Stafford Act’s limited definition of “emergency,”⁷² suggests that the Act is applicable only in a subset of emergencies, as that term is generally used, and that there is, therefore, a gap for 40 C.F.R. § 1506.11 to fill. This supports the Navy’s use of 40 C.F.R. § 1506.11 in *Winter v. NRDC*.⁷³

Similarly, with respect to Hurricane Katrina, the governors of Louisiana and Mississippi declared a state of emergency even before landfall of the storm.⁷⁴ On 29 August 2005, the day the hurricane hit, FEMA declared both states to be disaster areas.⁷⁵ Many emergency orders followed, exempting different operations from the standard environmental requirements.⁷⁶ For example, exemptions to the Clean Water Act (CWA)⁷⁷ were granted for discharging pumped water into Lake Pontchartrain without a National Pollutant Discharge Elimination System (NPDES) permit and for depositing into wetlands without a CWA section 404 permit.⁷⁸ Exemptions to the Clean Air Act’s (CAA)⁷⁹ requirements were also granted.⁸⁰

In November 2005, the American Bar Association’s Section of Environment, Energy, and Resources expressed its concerns to the Environmental Protection Agency (EPA) about expanded exemptions to environmental laws in general.⁸¹ “[T]he risks accompanying blanket

⁷⁰ 42 U.S.C. § 5122(1).

⁷¹ *Id.* § 5122(2).

⁷² *Id.* § 5122(1).

⁷³ See *infra* Section IV.B.

⁷⁴ Gerrard, *supra* note 59, at 12.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010)).

⁷⁸ 33 U.S.C. §§ 1342, 1344; Gerrard, *supra* note 59, at 12.

⁷⁹ Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401–7671q (2006 & Supp. IV 2010)).

⁸⁰ Gerrard, *supra* note 59, at 12.

⁸¹ *Id.* at 14.

exemptions to environmental regulations should not be removed without individual consideration of the dangers at issue.”⁸²

Congress has shown a greater willingness for passing NEPA exemptions than exemptions from other environmental statutes.⁸³ While CEQ regulations provide for emergency exemptions from NEPA, Congress has consistently chosen to enact project-specific exemptions instead of allowing agencies to use section 40 C.F.R. § 1506.11.⁸⁴ A comprehensive list of congressional legislation that provided exemptions or modifications to NEPA is difficult to compile, due to the fact that Congress tends to provide specific exemptions in appropriation bills, buried in thousands of unrelated provisions.⁸⁵ A second reason for the difficulty is that Congress often does not mention NEPA by name in the legislation, instead relying upon language that implicitly exempts or modifies NEPA’s application to the project.⁸⁶ An example is legislation directing action “notwithstanding any other provision of law.” Courts have interpreted this to mean that the new statute supersedes or trumps other statutes that are inconsistent, including NEPA.⁸⁷ Also making the task more difficult is that Congress often includes provisos that eliminate or limit the scope of judicial review; therefore, there is less case law discussing such exemptions.⁸⁸

1. Types of Exemptions to NEPA

a. Congressional Exemptions

If a federal statute guiding the actions of a federal agency is in “clear and unavoidable conflict” with NEPA, then the federal agency is exempt from compliance with NEPA.⁸⁹ While these types of legislative exemptions are rare,⁹⁰ they include impositions by Congress of a mandatory duty on an

⁸² *Id.*

⁸³ See Victor Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Law*, 15 HARV. ENVTL. L. REV. 435, 438 (1991).

⁸⁴ See Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 486 (1997).

⁸⁵ Ehrlich, *supra* note 7, at 286–87. See generally Richard Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L. J. 619 (2006).

⁸⁶ Ehrlich, *supra* note 13, at 287. See, e.g., Nat’l Coalition to Save our Mall v. Norton, 161 F. Supp. 2d 14, 20–21 (D.D.C. 2001).

⁸⁷ *Norton*, 161 F. Supp. 2d at 20.

⁸⁸ Sher & Hunting, *supra* note 83, at 438.

⁸⁹ Flint Ridge Dev. Co. v. Scenic Rivers Ass’n, 426 U.S. 776, 788 (1976).

⁹⁰ 1 ELPG, *supra* note 45, § 1.04[4]; see, e.g., W. Neb. Res. Council v. EPA, 943 F.2d 867, 871–72 (8th Cir. 1991) (Safe Water Drinking Act); Wyoming v. Hathaway, 525 F.2d 66, 71–73 (10th Cir. 1975) (Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)), cert. denied, 426 U.S. 906

agency,⁹¹ a direction to an agency that precludes the agency from considering environmental factors in its decision,⁹² or replacement of NEPA procedures with other procedures.⁹³ The courts are split on whether such exemptions must be explicit.⁹⁴

Most importantly, Congress can make specific statutory exemptions at any time. For example, the EPA's actions taken under the CAA are exempt from NEPA's requirements.⁹⁵ Similarly, under the CWA, the EPA's actions—other than providing grants to municipal wastewater treatment plants and issuing NPDES permits to new sources—are exempt.⁹⁶ In the military context, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 provided that nothing in NEPA or any of the implementing regulations shall require the Secretary of Defense or the Secretaries of the military departments to prepare a programmatic nation-wide EIS for low-level flight training as a precondition to the military's of airspace for the performance of low-level training flights.⁹⁷

(1976); *Warren County v. North Carolina*, 528 F. Supp. 276, 286–87 (E.D.N.C. 1981) (Toxic Substances Control Act).

⁹¹ See *Pac. Legal Found. v. Andrus*, 657 F.2d 829, 835–37 (6th Cir. 1981) (stating that the Endangered Species Act's (ESA) imposition of a duty on the U.S. Fish and Wildlife Service (FWS) to determine the endangered status of species based on specific criteria differing from those to be considered under NEPA in an EIS exempts the FWS from compliance with the EIS requirement).

⁹² See *Milo Cnty. Hosp. v. Weinberger*, 525 F.2d 144, 147–48 (1st Cir. 1975) (stating that no EIS was required as part of the decision to terminate a hospital's authorization to provide federally compensable Medicare services, because environmental factors are irrelevant to the decision and it would be impermissible to consider them under the Social Security Act).

⁹³ *Merrell v. Thomas*, 807 F.2d 776, 778–79 (9th Cir. 1986) (finding that NEPA did not apply when the EPA registered pesticides under FIFRA, because Congress intended FIFRA procedures to displace those of NEPA).

⁹⁴ Compare *Ala. ex rel. Siegelman v. U.S. Envtl. Prot. Agency*, 911 F.2d 499, 503–04 (1990) (finding that NEPA did not apply to the EPA's decision to issue an operating permit to a hazardous waste management facility under the Resource Conservation and Recovery Act (RCRA) despite NEPA's plain language declaring that it applies to the fullest extent possible to all agencies of the Federal Government, because the EPA's mission requires it to consider environmental questions and because RCRA and its procedures were newer and more specific), with *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729–30 (3d Cir. 1989) (holding that the provisions of NEPA apply along with those of the Atomic Energy Act (AEA) to a decision to grant an operating license to a nuclear power plant, because Congress displayed no specific intent for AEA to preclude application of NEPA).

⁹⁵ 15 U.S.C. § 793(c)(1) (2006 & Supp. IV 2010).

⁹⁶ 33 U.S.C. § 1372(a) (2006 & Supp. IV 2010).

⁹⁷ Pub. L. 106-398, § 317, 114 Stat. 1654, at 1654A-57 (2000).

Congress has also passed laws that explicitly bar federal courts from exercising jurisdiction to determine whether an agency has complied with NEPA for a specific action⁹⁸ and laws that indirectly have that effect.⁹⁹

In a few instances, Congress has acted explicitly to continue a program that would have been delayed or even halted by NEPA.¹⁰⁰ For example, Congress passed the Alaska Natural Gas Transportation Act¹⁰¹ in order to expedite the decision of whether to construct and, if so, to expedite the construction of a pipeline system to carry natural gas from Alaska to the lower 48 States.¹⁰² It did this by “limiting the jurisdiction of courts to review the actions of Federal officers or agencies . . . and permitting the limitation of administrative procedures and effecting the limitation of judicial procedures related to such actions.”¹⁰³ Instead, Congress gave the President the power to make conclusive decisions—subject to Congress’ approval—regarding the project’s compliance with NEPA and exempted from judicial review many project issues arising under the Act.¹⁰⁴ Congress chose to specifically exempt other federal projects in the Energy Supply and Environmental Coordination Act of 1974,¹⁰⁵ Disaster Relief Act of 1974,¹⁰⁶ and Regional Rail Reorganization Act of 1973.¹⁰⁷

⁹⁸ See Apache Survival Coalition v. United States, 21 F.3d 895, 904 (9th Cir. 1994) (finding constitutional the Arizona-Idaho Conservation Act of 1988, which deemed that requirements of NEPA had been met regarding agency’s approval of specified projects); Portland Audubon Soc’y v. Babbitt, 998 F.2d 705, 709 (9th Cir. 1993) (discussing temporary limitations placed on judicial review of NEPA issues contained in the Department of the Interior and Related Agencies Appropriations Act of 1989); Daingerfield Island Protective Soc’y v. Lujan, 920 F.2d 32, 35 (D.C. Cir. 1990) (discussing the December 22, 1987 Continuing Appropriations Act provision barring judicial review of an EIS specifically required by the statute for a specific project), *cert. denied*, 502 U.S. 809 (1991); Envtl. Def. Fund, Inc. v. Higginson, 655 F.2d 1244, 1246 (D.C. Cir. 1981) (rider to appropriations bill for Department of Interior declared that action should proceed as if final EIS had been filed).

⁹⁹ See Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990) (holding that the trial court did not have jurisdiction to consider whether the EPA complied with NEPA in selecting a hazardous waste remediation method under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, even though the APA presumptively permits judicial review of agency actions for NEPA compliance, because CERCLA barred judicial review of remedial action until remediation was completed), *cert. denied*, 498 U.S. 981 (1990).

¹⁰⁰ E.g., Alaska Natural Gas Transportation Act, 15 U.S.C. § 719(h)(c)(3) (2006 & Supp. IV 2010); Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1) (2006 & Supp. IV 2010); Disaster Relief Act of 1974, 42 U.S.C. § 5175 (2006 & Supp. IV 2010); Regional Rail Reorganization Act of 1973, 45 U.S.C. § 791(c) (2006 & Supp. IV 2010); The Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, § 141, 87 Stat. 250, 271 (1973).

¹⁰¹ 15 U.S.C. §§ 719–719o (2006 & Supp. IV 2010).

¹⁰² *Id.* § 719a.

¹⁰³ *Id.*

¹⁰⁴ *Id.* §§ 719e, 719f(d)(2), 719h; Earth Res. Co. of Alaska v. Fed. Energy Regulatory Comm’n, 617 F.2d 775 (D.C. Cir. 1980).

¹⁰⁵ 15 U.S.C. § 793(c)(1) (2006 & Supp. IV 2010).

b. Regulatory Exceptions

On 29 November 1978, 40 C.F.R. § 1506.11 became effective, thus creating the “emergency” exception to the requirement to prepare an EIS.¹⁰⁸ It was part of the initial regulations created for the CEQ to implement NEPA in response to Executive Order 11,991 of 24 May 1977.¹⁰⁹ The regulation has no direct statutory authority but can be supported by 42 U.S.C. § 4331(b), which says that it is the U.S. Government’s responsibility to “use all practicable means, consistent with other essential considerations of national policy”¹¹⁰ when considering the environmental impacts of its actions.¹¹¹ The final version of the emergency exception was only slightly different from the draft.¹¹² The initial wording said that under emergency circumstances, “the Federal agency proposing to take the action should consult with the Council about alternative arrangements.”¹¹³ Out of concern that the regulation could be construed as requiring consultation before an emergency occurred, the regulation was changed to read as it does today.¹¹⁴ Under this exception, once the CEQ determines that an emergency exists, it requires consultation between the agency and the CEQ to prepare alternative arrangements to the preparation of an EIS.¹¹⁵ However, the CEQ has not defined what situations it considers an emergency.¹¹⁶ Furthermore, the CEQ has not stated that 40 C.F.R. § 1506.11 waives the statutory requirements for preparing an EIS. That is to say, if an agency has an emergency situation, can it undertake the major federal action without ever doing an EIS? The alternative is that it would undertake the action first, and then do an EIS, which runs contrary to the one of the purposes behind NEPA, which is to give decision-makers enough information in order to make an intelligent decision.

Air Force regulations regarding the environmental impact analysis process allow for special and emergency procedures.¹¹⁷ While the regulation makes clear that emergency situations do not exempt the Air Force from

¹⁰⁶ 42 U.S.C. § 5175 (2006 & Supp. IV 2010).

¹⁰⁷ 45 U.S.C. § 791(c) (2006 & Supp. IV 2010).

¹⁰⁸ Council on Environmental Quality Final Regulations Implementing the Procedural Provisions of NEPA, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (codified as amended at 40 C.F.R. pts. 1500–1508 (2011)).

¹⁰⁹ Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 25, 1977).

¹¹⁰ 42 U.S.C. § 4331(b) (2006 & Supp. IV 2010).

¹¹¹ ALEXANDER, *supra* note 5, at 9.

¹¹² Compare 43 Fed. Reg. 25,230, 25,243 (June 9, 1978) with 43 Fed. Reg. 55,978, 55,988 (Nov. 29, 1978) (codified at 40 C.F.R. § 1506.11 (2011)).

¹¹³ 43 Fed. Reg. 25,230, 25,243.

¹¹⁴ 43 Fed. Reg. 55,978, 55,988 (codified at 40 C.F.R. § 1506.11); ALEXANDER, *supra* note 5, at 9.

¹¹⁵ 40 C.F.R. § 1506.11; Orsi, *supra* note 42 at 484.

¹¹⁶ Orsi, *supra* note 42, at 484.

¹¹⁷ 32 C.F.R. § 989.34(b) (2011).

complying with NEPA, it acknowledges “certain emergency situations may make it necessary to take immediate action having significant environmental impact, without observing all the provisions of the CEQ regulations” and requires that potential actors in such situations “promptly notify [headquarters], for . . . coordination and CEQ consultation, before undertaking emergency actions that would otherwise not comply with NEPA.”¹¹⁸ The regulation also recognizes that there are times when prior notification and consultation are not feasible, stating: “The immediate notification requirement does not apply where emergency action must be taken without delay. Coordination in this instance must take place as soon as practicable.”¹¹⁹ In applying this exception, the courts do not simply allow Department of Defense (DOD) agencies to bypass NEPA but will allow a military department to make a decision without fulfilling public notice and comment requirements.¹²⁰

From November 1977 to September 2008, forty-one alternative arrangements have been granted by the CEQ.¹²¹ Of these, twelve were related to water issues and four were related to each of the spraying of pesticides, killing of wildlife, and provision of support to the military.¹²² Others related to the removal of trees, firefighting, and radioactive material.¹²³ Not surprisingly, the agency with the most requests for emergency exceptions was the U.S. Forest Service, followed by the Bureau of Land Management.¹²⁴ The various military departments of the DOD requested emergency exceptions nine times—four from the Department of Army, two from the Department of Air Force, two from Army Corps of Engineers, and only one from the Department of the Navy.¹²⁵

c. Exceptions Through Case Law

Courts have generally held that a federal agency does not have to prepare an EIS when it has already prepared a “functional equivalent.”¹²⁶ This

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Colonel E.G. Willard, Lieutenant Colonel Tom Zimmerman & Lieutenant Colonel Eric Bee, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives without New Legislation?*, 54 A.F. L. REV. 65, 82 (2004). See *Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214 (9th Cir. 1979).

¹²¹ Council on Envtl. Quality, Exec. Office of the President, *Alternative Arrangements Pursuant to 40 CFR Section 1506.11—Emergencies*, NEPANET (last updated Sep. 2008), http://ceq.hss.doe.gov/nepa/eis/Alternative_Arrangements_Chart_092908.pdf [hereinafter Council on Envtl. Quality]; 1 ELPG, *supra* note 45, § 1.04[7].

¹²² Council on Envtl. Quality, *supra* note 121.

¹²³ *Id.*

¹²⁴ *Id.* Forest Service and APHIS combined equaled a total of ten USDA requests, and BLM and the FWS combined equaled a total of nine Department of the Interior requests. *Id.*

¹²⁵ *Id.*

¹²⁶ 1 ELPG, *supra* note 45, § 1.04[6].

doctrine states that when a federal agency must comply with procedures mandated by other federal statutes with regard to a proposed action, and when compliance with these procedures is the equivalent of compliance with NEPA, the agency does not have to duplicate procedures.¹²⁷ This doctrine has been applied mainly to regulatory actions taken by the EPA.¹²⁸

The general rule concerning extraterritoriality is that federal statutes are not presumed to apply outside of the United States unless there is clear indication by Congress. There is case law to say that NEPA does not apply to certain military actions on U.S. installations located in Japan¹²⁹ or to movement of U.S. munitions through Germany.¹³⁰ The *Environmental Defense Fund, Inc. v. Massey* case held that NEPA did apply to U.S. action in Antarctica due to Antarctica's not falling under any nation's sovereignty.¹³¹

The CEQ has issued guidance on NEPA analyses for proposed federal actions in the United States that may have environmental effects across U.S. borders.¹³² The CEQ determined that agencies must include discussion of reasonably foreseeable trans-boundary effects of proposed actions in their analyses of proposed actions in the United States.¹³³ As a practical consideration, the CEQ noted that federal agencies should use the scoping process set out in 40 C.F.R. § 1501.7 to identify actions that may have such effect¹³⁴ and "should be particularly alert to actions that may affect migratory

¹²⁷ *Id.* See, e.g., W. Neb. Res. Council v. EPA, 943 F.2d 867, 871–72 (8th Cir. 1991) (Safe Drinking Water Act); Wyoming v. Hathaway, 525 F.2d 66, 71–73 (10th Cir. 1975) (FIFRA), cert. denied, 426 U.S. 906 (1976); Warren County v. North Carolina, 528 F. Supp. 276, 286–87 (E.D.N.C. 1981) (Toxic Substances Control Act); Maryland v. Train, 415 F. Supp. 116, 121–22 (D. Md. 1976) (Ocean Dumping Act). See generally Alabama *ex rel.* Siegelman v. EPA, 911 F.2d 499, 504–05 (11th Cir. 1990) (discussing functional equivalency doctrine).

¹²⁸ 1 ELPG, *supra* note 45, § 1.04[6]. See *supra* note 125 and accompanying text. Cf. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985) (NIH procedures for approving experiment involving genetically engineered organisms, conducted under agency guidelines, were not functional equivalent of an EA). But see *D'Agnillo v. U.S. Dept. of Hous. & Urban Dev.*, 738 F. Supp. 1454, 1460 (S.D.N.Y. 1990) (supplemental environmental review prepared by HUD was functional equivalent of comprehensive finding of no significant impact), aff'd, 923 F.2d 17 (2d Cir. 1991), cert. denied, 501 U.S. 1254 (1991).

¹²⁹ *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

¹³⁰ *Greenpeace USA v. Stone*, 924 F.2d 175 (9th Cir. 1991).

¹³¹ *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

¹³² Memorandum from Kathleen A. McGinty, Chair, Council of Envtl. Quality, Exec. Office of the President, to Heads of Agencies (July 1, 1997) (on file with the author) [hereinafter CEQ Memo], available at <http://ceq.hss.doe.gov/nepa/reg/transguide.html>.

¹³³ *Id.*

¹³⁴ 40 C.F.R. § 1501.7 (2011) (defining "scoping" as "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action").

species, air quality, watersheds, and other components of the natural ecosystem that cross borders.”¹³⁵

d. Categorical Exclusions

A categorical exclusion (CATEX) is not an exemption from NEPA but an administrative shortcut for actions federal agencies perform on a regular basis that do not significantly impact the environment.¹³⁶ Under this procedure, federal agencies publish lists of their regularly performed, insignificant impact actions.¹³⁷ Agency performance of an action on its list does not trigger the EA or EIS preparation requirement.¹³⁸ For example, the Navy currently has forty-five CATEXs for actions such as routine use of existing facilities; routine movement of mobile assets, such as ships and aircraft, for homeport reassignments, for repair/overhaul, or to train/perform as operational groups where no new support facilities are required; and short-term increases in air operations.¹³⁹ However, segmentation of actions to avoid the requirements of NEPA is generally not permitted.¹⁴⁰ For example, the Navy cannot take one big project that certainly would qualify as “major” and split it so as to apply individual CATEXs for the upgrade of one building,¹⁴¹ the refitting of another building,¹⁴² the upgrade of pier facilities,¹⁴³ and the change of homeport of a ship,¹⁴⁴ and thereby avoid the preparation of an EA or EIS.¹⁴⁵

2. Arguments Against Exemptions

There are many critics of the use of exemptions, exceptions, or waivers to environmental laws and, in particular, of their use by the military. One such critic, Joel R. Reynolds, a senior attorney with the NRDC, writes that the military departments emphasize their special role in defense readiness “even

¹³⁵ CEQ Memo, *supra* note 132.

¹³⁶ 40 C.F.R. § 1508.4 (2011). For a critique of the current process involving CATEXs, see Kevin H. Morarity, Note, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. Rev. 2312 (2004).

¹³⁷ 40 C.F.R. § 1507.3(b)(2)(ii) (2011).

¹³⁸ *Id.*

¹³⁹ 32 C.F.R. § 775.6(f); U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5090.1C, ENVIRONMENTAL READINESS PROGRAM MANUAL para. 5-2.2 (30 Oct. 2007) (C1, 18 Jul 2011).

¹⁴⁰ *E.g.*, Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981).

¹⁴¹ U.S. DEP’T OF NAVY, *supra* note 139, at 5-47 tbl.5-2.1 (applying CATEX 14).

¹⁴² *Id.* (applying CATEX 8).

¹⁴³ *Id.* (applying CATEX 8).

¹⁴⁴ *Id.* (applying CATEX 11).

¹⁴⁵ See U.S. DEP’T OF NAVY, *supra* note 139, para. 5-2.2 (stating that action proponents within the Navy may not split an action into multiple elements in order apply multiple CATEXs and, thus, avoid preparation of an EA, unless the actions when considered cumulatively have the same environmental impact).

without an applicable statutory national security exemption, in defending virtually any of their actions challenged through our legal system.”¹⁴⁶ He cites to *Korematsu v. United States*, upholding the internment of Japanese Americans during World War II,¹⁴⁷ as “the height of judicial abdication in the face of such a claim.”¹⁴⁸ In the environmental arena, he continues, similar claims have consistently been asserted by the Navy in defending its compliance with environmental laws, “but with less success.”¹⁴⁹

After the end of the Cold War, Secretary of Defense Dick Cheney declared: “Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns.”¹⁵⁰ Seemingly gone were the days when the environmental consequences of preparing for war were ignored and the public was denied access to information about such consequences.¹⁵¹ In 1996, the DOD issued a directive announcing its policy to “display environmental security leadership within DOD activities worldwide” by “[e]nsuring that environmental factors are integrated into the DOD decision-making process” and “[p]rotecting, preserving, and, when required, restoring and enhancing the quality of the environment.”¹⁵²

¹⁴⁶ Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 759, 759 (2008).

¹⁴⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁴⁸ Reynolds, *supra* note 146, at 759.

¹⁴⁹ *Id.* Note that his article was written before some of the cases he used as examples were concluded and that the definition of “success” is relative. *Id.*

¹⁵⁰ Richard B. Cheney, U.S. Sec’y of Def., Address to the Defense & Environment Initiative Forum (Sep. 3, 1990), quoted in Stephen Dycus, *Osama’s Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL’Y REV. 1, 3 (2005).

¹⁵¹ Dycus, *supra* note 150, at 3.

¹⁵² U.S. DEP’T OF DEF., DIR 4715.1, ENVIRONMENTAL SECURITY (24 Feb. 1996), canceled by U.S. DEP’T OF DEF., DIR 4715.1E, ENVIRONMENTAL, SAFETY, AND OCCUPATIONAL HEALTH (ESOH) (19 Mar. 2005). In 1996, the DOD also issued the following instructions: U.S. DEP’T OF DEF., INSTR. 4715.2, REGIONAL ENVIRONMENTAL COORDINATION (3 May 1996); U.S. DEP’T OF DEF., INSTR. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996); U.S. DEP’T OF DEF., INSTR. 4715.4, POLLUTION PREVENTION (18 June 1996) (C1, 6 July 1998); U.S. DEP’T OF DEF., INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996); U.S. DEP’T OF DEF., INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE (24 Apr. 1996); U.S. DEP’T OF DEF., INSTR. 4715.7, ENVIRONMENTAL RESTORATION PROGRAM (22 Apr. 1996); U.S. DEP’T OF DEF., INSTR. 4715.9, ENVIRONMENTAL PLANNING AND ANALYSIS (3 May 1996); and U.S. DEP’T OF DEF., INSTR. 4715.10, ENVIRONMENTAL EDUCATION, TRAINING AND CAREER DEVELOPMENT (24 Apr. 1996). Subsequent instructions are the following: U.S. DEP’T OF DEF., INSTR. 4715.8, ENVIRONMENTAL REMEDIATION FOR DOD ACTIVITIES OVERSEAS (2 Feb. 1998); U.S. DEP’T OF DEF., INSTR. 4715.13, DOD NOISE PROGRAM (15 Nov. 2005); U.S. DEP’T OF DEF., INSTR. 4715.14, OPERATIONAL RANGE ASSESSMENTS (30 Nov. 2005); U.S. DEP’T OF DEF., INSTR. 4715.15, ENVIRONMENTAL QUALITY SYSTEMS (11 Dec. 2005); U.S. DEP’T OF DEF., INSTR. 4715.16, CULTURAL RESOURCES MANAGEMENT (18 Sep. 2008); U.S. DEP’T OF DEF., INSTR. 4715.17,

In the past decade, the DOD and others in the George W. Bush administration have used the threat of a renewed terrorist attack to argue for the relaxation of environmental laws, so as to enable the military to conduct proper training, and for the development of new weapon systems necessary to execute the “war on terrorism.”¹⁵³ For example, in 2002, the Pentagon announced a multi-year campaign—the Readiness and Range Preservation Initiative (RRPI)—designed to promote sweeping changes of some of the most important environmental laws.¹⁵⁴ RRPI included proposals to amend the CAA; the Resources Conservation and Recovery Act; the Endangered Species Act (ESA); the Marine Mammal Protection Act (MMPA); the Migratory Bird Treaty Act; the Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA); and perhaps even the CWA.¹⁵⁵ Meanwhile, the Pentagon began to push for regulatory reforms that would make it easier for the military to comply with these laws.¹⁵⁶

The Defense Department’s request for broader exemptions was, needless to say, contentious in Congress.¹⁵⁷ Some agreed that such exemptions are necessary to provide greater flexibility for combat training and other such readiness activities.¹⁵⁸ Other members of Congress—plus states, communities, and environmental organizations—opposed broader exemptions, questioning the degree to which environmental requirements have compromised military readiness overall.¹⁵⁹ They also argued that expanding exemptions without a clear national security need could unnecessarily weaken environmental protection.¹⁶⁰

In response to the DOD’s request, the 107th Congress enacted an exemption from the Migratory Bird Treaty Act and the 108th Congress enacted exemptions from the MMPA and the ESA.¹⁶¹ There was greater opposition to

ENVIRONMENTAL MANAGEMENT SYSTEMS (15 Apr. 2009); and U.S. DEP’T OF DEF., INSTR. 4715.18, EMERGING CONTAMINANTS (ECS) (11 June 2009).

¹⁵³ Dycus, *supra* note150, at 1.

¹⁵⁴ *Id.* at 1–2.

¹⁵⁵ *Id.* at 2.

¹⁵⁶ Memorandum from Paul W. Mayberry, Exec. Sec’y, Senior Readiness Oversight Council, U.S. Dep’t of Def., to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, and Service Chiefs (Dec 10, 2002) (on file with the author), *available at* http://www.peer.org/docs/dod/DoD_2003attacks.pdf, *discussed in* Dycus, *supra* note150, at 2.

¹⁵⁷ DAVID M. BEARDEN, CONG. RESEARCH SERV., RS22149, EXEMPTIONS FROM ENVIRONMENTAL LAW FOR THE DEPARTMENT OF DEFENSE CRS-2 (2008) [hereinafter BEARDEN].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

requests for exemptions from the CAA, Solid Waste Disposal Act, and CERCLA, and Congress has not enacted these exemptions to date.¹⁶²

A study by the Congressional Research Service in 2005 found that “[a]lthough DOD has cited some examples of training restrictions or delays at certain installations and has used these as a basis for seeking legislative remedies, the department does not have a system in place to comprehensively track these cases and determine their impact on readiness.”¹⁶³ This echoes what EPA Administrator Christine Todd Whitman said in early 2003: “I don’t believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation.”¹⁶⁴ Perhaps most strongly worded were Congressman John Dingell’s remarks in 2002: “I have dealt with the military for years and they constantly seek to get out from under environmental laws. But using the threat of 9-11 and al Qaeda to get unprecedented environmental immunity is despicable.”¹⁶⁵

The U.S. General Accountability Office (GAO) conducted a study to determine the extent to which environmental requirements have affected military readiness and issued its findings in March 2008.¹⁶⁶ It found that while environmental requirements did cause some training activities to be delayed, cancelled, or altered, the readiness data did not indicate that those actions had hampered military readiness overall.¹⁶⁷

The House Armed Services Committee also directed the GAO to look at the effect of military exemptions on the environment.¹⁶⁸ Based on information from regulatory agencies, the GAO’s March 2008 report did not identify any instance in which the use of the new exemptions from the Migratory Bird Treaty Act and the ESA had adversely affected the

¹⁶² *Id.* The DOD requested them in the defense authorization proposals for fiscal years 2003 through 2008, but excluded the request from the fiscal year 2009 proposal. *Id.*

¹⁶³ BEARDEN, *supra* note 157, at 3.

¹⁶⁴ Eric Pianin, *Environmental Exemptions Sought; For Readiness Efforts, Pentagon Says It Needs Relief from Rules*, WASH. POST, Mar. 6, 2003, at A21 (discussing a hearing before the Senate Environment & Public Works Committee).

¹⁶⁵ Press Release, Comm. on Energy and Commerce Democrats, U.S. House of Representatives, Bush Administration take Aim at Migratory Birds: Legislation Unilaterally Exempts Military from Environmental Law (Oct. 22, 2002), *quoted in* Dycus, *supra* note 150, at 10.

¹⁶⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-407, MILITARY TRAINING: COMPLIANCE WITH ENVIRONMENTAL LAWS AFFECTS SOME TRAINING ACTIVITIES, BUT DOD HAS NOT MADE A SOUND BUSINESS CASE FOR ADDITIONAL ENVIRONMENTAL EXEMPTIONS (2008) [hereinafter GAO-08-407].

¹⁶⁷ *Id.* at 6. GAO had issued prior reports with similar findings. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-621T, MILITARY TRAINING: DOD APPROACH TO MANAGING ENCROACHMENT ON TRAINING RANGES STILL EVOLVING (2003); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-614, MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES (2002).

¹⁶⁸ GAO-08-407, *supra* note 166, at 4.

environment.¹⁶⁹ However, the GAO could not determine the effect of exemptions from the MMPA.¹⁷⁰

In weighing military action versus environmental compliance, the potential gravity of a wrong decision leads to resolution of most doubts in favor of military action, especially during time of war or a great national emergency.¹⁷¹ Congress, however, included provisions in most environmental statutes that allow for their temporary waiver on a case-by-case basis, in order to respond to these types of crises.¹⁷²

III. Court Cases Involving the Emergency Exception

Because 40 C.F.R. § 1506.11 does not define “emergency” or give examples of situations qualifying for the exception and as there is nothing instructive in the history of the CEQ’s regulations, we must turn to the courts for guidance on this issue. While forty-one emergency exceptions and alternative arrangements have been granted by the CEQ, only three of those cases resulted in legal challenges through the federal court system. Consequently, there is a dearth of guidance.

A. Cases Applying the Emergency Exception

1. *Crosby v. Young*¹⁷³

The first case citing the emergency exception contained in 40 C.F.R. § 1506.11 set the tone for its future uses. This case involved General Motor’s (GM) construction of a new plant—Central Industrial Park (CIP)—on 100 acres of residential and commercial land in the Poletown section of Detroit using funding from a U.S. Department of Housing and Urban Development (HUD) program.¹⁷⁴ The residents of Poletown proposed a smaller site, and the issue was litigated in state court.¹⁷⁵ When that was unsuccessful, the plaintiffs filed suit in federal court, alleging HUD’s actions violated NEPA.¹⁷⁶

¹⁶⁹ *Id.* at 6.

¹⁷⁰ *Id.* at 8–9.

¹⁷¹ Dycus, *supra* note 150, at 5.

¹⁷² *Id.* at 4.

¹⁷³ *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

¹⁷⁴ *Id.* at 1365.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1367.

The plaintiffs asserted, among other things, that HUD's approval of funding prior to preparation of a final EIS violated NEPA section 4332(2)(C).¹⁷⁷ However, prior to HUD's approval of the financing arrangement, Detroit asked the CEQ for guidance under 40 C.F.R. § 1506.11, asserting that emergency circumstances made it difficult to comply with CEQ regulations and suggesting alternative arrangements. The CEQ approved the alternative arrangements, acknowledging in its response that the CIP project could not go forward unless federal financial assistance was committed by 1 October 1980.¹⁷⁸ The plaintiffs responded that the CEQ was without power to permit federal action to begin before an EIS had been prepared, because the requirement was statutory and the CEQ had no authority to modify or waive statutory requirements.¹⁷⁹

The district court disagreed.¹⁸⁰ "It is immediately apparent that CEQ not only had the authority to waive its own regulations for Detroit, but also to interpret the provisions of NEPA to accommodate emergency circumstances."¹⁸¹ The court went on to discount the plaintiffs' claim that Detroit misrepresented the gravity of the circumstances, scoffing at the plaintiffs' suggestion that the CEQ allowed the exception due solely to Detroit's contractual obligation to turn over the construction site to GM by 1 May 1981 and its attendant need to relocate elderly persons living on the property prior to winter.¹⁸² Although these were bases stated in the CEQ's letter of concurrence, the CEQ also relied on other factors, such as unemployment, crime, a decreasing tax base, and a decrease in bond rating below investment grade.¹⁸³ "The necessity of federal funds to complete the CIP project has never been questioned and it was the need to have a commitment from HUD, and not the relocation of persons before the onset of winter, that prompted the request."¹⁸⁴ Accordingly, the court found that HUD, through Detroit's actions, had been properly permitted to make alternative arrangements and release funding prior to the completion of an EIS.¹⁸⁵

¹⁷⁷ *Id.* at 1384–85; 24 C.F.R. § 58.17(f)(5) (2011). As for the timeline, HUD approved the loan to the city of Detroit on 1 October 1980, and released the funds on 31 October 1980. *Id.* at 1367. The Draft EIS was issued on 17 October 1980, and the Final EIS was published on 22 December 1980, with the Record of Decision signed on 10 February 1981. *Id.*

¹⁷⁸ *Id.* at 1380.

¹⁷⁹ *Id.* at 1384–85.

¹⁸⁰ *Id.* at 1386.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1396–97.

¹⁸⁵ *Id.* at 1397.

2. *National Audubon Society v. Hester*¹⁸⁶

The U.S. Fish & Wildlife Service (FWS) in December 1985 issued a permit authorizing the capture and removal of all six surviving wild California condors.¹⁸⁷ This was a change in their previous position made in response to the loss of six of the then fifteen wild condors over the winter of 1984 to 1985.¹⁸⁸ The Service contacted CEQ, and it certified that due to the urgent nature of the Service's concerns about condor mortality, immediate documentation of the environmental effects of the proposal was unnecessary.¹⁸⁹ The plaintiff, the National Audubon Society, sued for a preliminary injunction, and the District Court for the District of Columbia granted the injunction.¹⁹⁰ In its opinion, the court described the Service's actions as "circumventing" and "avoid[ing]" compliance with NEPA.¹⁹¹ The court also pointed out that the only document explaining the need for an emergency exception was a letter from CEQ General Counsel to the Director of the Service stating that "[FWS] views this action as an emergency due to the precipitous decline in the number of Condors in the past year (6 Condors have been lost from the wild population)."¹⁹² The court concluded "[t]his . . . is a questionable basis for the finding of an 'emergency'.¹⁹³ The six Condors referred to had been lost eight months before the Service requested the exception, and the record was "very sparse and limited in support of FWS' assertions."¹⁹⁴

However, the Court of Appeals for the District of Columbia Circuit reversed, finding that the Service's decision constituted a "reasoned exercise of its discretion in fulfilling its statutory mandate."¹⁹⁵ The Court of Appeal's holding rested on a finding that the FWS adequately complied with NEPA in its earlier EA and an addendum issued after it changed its position on the remaining six wild condors.¹⁹⁶ In a footnote, the Court of Appeals stated that since the

¹⁸⁶ Nat'l Audubon Soc'y v. Hester, 627 F. Supp. 1419 (D.D.C. 1986).

¹⁸⁷ *Id.* at 1421. The remaining twenty condors were in zoos in Los Angeles and San Diego as part of breeding programs designed to prevent extinction. Nat'l Audubon Soc'y v. Hester, 801 F.2d 405, 405 (D.C. Cir. 1986).

¹⁸⁸ 627 F. Supp. at 1421.

¹⁸⁹ *Id.* at 1423.

¹⁹⁰ *Id.* at 1425.

¹⁹¹ *Id.* at 1423.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Nat'l Audubon Soc'y v. Hester, 801 F.2d 405, 405 (D.C. Cir. 1986).

¹⁹⁶ *Id.* at 408.

CEQ's interpretation of NEPA is entitled to substantial deference,¹⁹⁷ the district court erred in saying that no emergency existed.¹⁹⁸

3. *Valley Citizens for a Safe Environment v. West*¹⁹⁹

In this case, the only discussing the use of the emergency exception by the military, the plaintiff was a nonprofit citizen's association of approximately 350 members, all of whom lived in communities bordering Westover Air Force Base (AFB) in Massachusetts.²⁰⁰ The defendants were the Secretary of the Air Force and the Chairman of the CEQ.²⁰¹ The plaintiff sought a preliminary injunction to prevent the Air Force from flying C-5A transport airplanes in and out of Westover AFB between 10:00 p.m. and 7:00 a.m.²⁰²

The background to this dispute is relevant. In April 1987, after issuing an EIS evaluating the effects of the presence and operation of sixteen C-5A planes on the environment, the Air Force transferred the planes to Westover AFB.²⁰³ The plaintiff filed suit to enjoin the transfer but relief was denied by the District Court for the District of Massachusetts.²⁰⁴ The EIS provided that no military activity would be routinely scheduled between 10:00 p.m. and 7:00 a.m.²⁰⁵ Nonetheless, in September 1990, the Air Force began flying C-5As on a 24-hour schedule, due to Operation Desert Storm.²⁰⁶ The Plaintiff requested the Air Force to prepare a supplemental EIS²⁰⁷ in order to evaluate the environmental impacts of the nighttime flights, especially with regards to noise, but the Air Force refused.²⁰⁸ Instead, it told the plaintiff that the CEQ had granted emergency provisions and allowed the Air Force to forgo strict

¹⁹⁷ *Id.* at 408 n.3 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)).

¹⁹⁸ *Id.*

¹⁹⁹ *Valley Citizens for a Safe Env't v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863 (D. Mass. May 6, 1991).

²⁰⁰ *Id.* at *1 n.1.

²⁰¹ *Id.* at *1.

²⁰² *Id.*

²⁰³ *Id.* at *3.

²⁰⁴ *Id.* (citing *Valley Citizens for a Safe Env't v. Aldridge*, 695 F. Supp. 605 (D. Mass. 1988), *aff'd*, 886 F.2d 458 (1st Cir. 1989)).

²⁰⁵ *Id.* at *4.

²⁰⁶ *Id.* at *5.

²⁰⁷ While NEPA does not explicitly require supplemental EISs, 40 C.F.R. §1502.9 (2011) does require an supplemental EIS when the agency makes substantial changes in the proposed action relevant to environmental concerns or when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or impacts. *Valley Citizens for a Safe Env't v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863, at *5 n.5 (D. Mass. May 6, 1991).

²⁰⁸ *Valley Citizens for a Safe Env't v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863, at *5 n.5 (D. Mass. May 6, 1991).

compliance with NEPA.²⁰⁹ On 25 March 1991, the plaintiff filed suit seeking declaratory and injunctive relief.²¹⁰ Besides the claim for a declaratory judgment that the Air Force had violated NEPA and CEQ regulations by failing to do an supplemental EIS before beginning nighttime C-5A flights, the plaintiff also sought a declaratory judgment stating that the CEQ had acted arbitrarily and capriciously by allowing the Air Force to conduct such flights without NEPA compliance and sought an injunction stopping the nighttime flights.²¹¹

The court noted that as of the date of its opinion, 6 May 1991, C-5As continued to fly at Westover AFB both day and night, transporting machines, equipment, and military personnel to and from the Middle East.²¹² The Air Force would not tell the court a set date that nighttime operations would stop but did indicate that it anticipated the flights ending by July 1991.²¹³

In deciding whether the defendants had violated NEPA by failing to prepare a supplemental EIS before beginning nighttime operations, the district court first focused on language in NEPA section 4332 requiring that an agency prepare an EIS with regard to proposed environmentally significant federal action “to the fullest extent possible.”²¹⁴ For a definition of that phrase, the court looked to the Supreme Court’s opinion in *Flint Ridge Development Co. v. Scenic River Association*.²¹⁵ The district court construed “*Flint* to mean that where any agency has opposing legal obligations, it may forego strict compliance with NEPA.” The district court refused, however, to construe *Flint* to mean that agencies must strictly comply with NEPA in all cases except those in which the agencies’ legal obligations conflict.²¹⁶ “Congress could not have intended NEPA to cripple the quick response capabilities of federal agencies where failures to take immediate action could result in dire consequences.”²¹⁷ The court relied on language in NEPA section 4331 for its positions that environmental concerns were to govern federal action only when “consistent with other essential considerations of national policy” and that other goals or interests of the United States may make strict compliance with NEPA

²⁰⁹ *Id.*

²¹⁰ *Id.* at *6.

²¹¹ *Id.* at *6–7.

²¹² *Id.* at *7.

²¹³ *Id.*

²¹⁴ *Id.* at *10–11.

²¹⁵ *Id.* (citing *Flint Ridge Dev. Co. v. Scenic River Assn.*, 426 U.S. 776, 788 (1976) (construing “to the fullest extent possible” as meaning an agency must strictly comply with NEPA’s requirements unless such compliance would create an “irreconcilable and fundamental conflict” with other statutory obligations’)). *See supra* note 89 and accompanying text.

²¹⁶ *Valley Citizens for a Safe Env’t v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863, at *11 n.6 (D. Mass. May 6, 1991).

²¹⁷ *Id.*

impossible.²¹⁸ Finally, the district court cited 40 C.F.R. § 1506.11, the emergency exception to NEPA, and its allowance of alternative arrangements.²¹⁹ As a whole, the court concluded the statutory language of NEPA and the applicable CEQ regulation make clear that while NEPA ordinarily requires completion of an EIS, or supplemental EIS in this case, emergency circumstances may make completion of the NEPA document unnecessary.²²⁰

In this case, the parties disagreed as to what constituted an “emergency.” Both the Air Force and the CEQ determined that the continuing and unstable situation in the Middle East created an emergency.²²¹ “Defendants contended that the C-5As at Westover AFB carry a steady stream of equipment and personnel essential to military operations at home and abroad, and that disruption of the twenty-four hour operation could create unmanageable scheduling and supply problems.”²²² The plaintiff, on the other hand, pointed out that even if an emergency existed before, the emergency ended with the fighting in March 1991.²²³

The court held that the determination by the Air Force and the CEQ that the crisis in the Middle East constituted an emergency was not arbitrary and capricious and granted the defendants’ motion for summary judgment.²²⁴ Various Air Force officials provided affidavits describing a complex, global flight schedule that relied on the 24-hour availability of Westover AFB’s C-5As.²²⁵ Westover AFB was one of the few bases in the United States capable of servicing, maintaining, and supplying C-5As and one of only two C-5A staging bases in the United States for all operations in the Persian Gulf.²²⁶ Looking at the evidence presented, the court found that the defendants could reasonably interpret the current crisis to be an emergency within the meaning of NEPA and CEQ regulations, given the military’s operational and scheduling difficulties and the hostile and unpredictable nature of the Persian Gulf region.²²⁷ The court

²¹⁸ *Id.* at *12 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976)). The court felt its interpretation was consistent with NEPA section 4331 and case law from other jurisdictions. *See, e.g.*, *Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405 (D.C. Cir. 1986); *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

²¹⁹ *Valley Citizens for a Safe Env't v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863, at *12–13 (D. Mass. May 6, 1991).

²²⁰ *Id.* at *13.

²²¹ *Id.*

²²² *Id.* at *14.

²²³ *Id.*

²²⁴ *Id.* at *16, *21.

²²⁵ *Id.* at *16.

²²⁶ *Id.* at *17. The other base was Dover AFB, which was already operating a near maximum capacity. Stewart AFB did not have the C-5A parking and other capabilities, so it could not be used. *Id.*

²²⁷ *Id.* at *17–18.

stressed that the Air Force did not try to justify the nighttime operations by vague assertions of national security or world peace.²²⁸

Additionally, the court pointed out that alternative arrangements were agreed upon by the Air Force and the CEQ.²²⁹ Air Force planned to do an EA by May 1991, analyzing alternative flight scheduling possibilities, noise impacts, and reduced nighttime operations.²³⁰ Although ruling against the plaintiff, the court sympathized with the situation in which its members were placed and threatened that if nighttime operations continued after July 1991, “this Court will not hesitate to invoke, where necessary, all of the equitable powers at its disposal to protect Valley Citizens’ members from continued nighttime disturbances.”²³¹

B. Cases Discussing the Emergency Exception

1. *Cohen v. Price Commission*²³²

Cohen is another early case—decided in 1972—in which the emergency exception was discussed.²³³ The plaintiffs sued for injunctive relief alleging that the Price Commission²³⁴ violated NEPA by authorizing a five-cent subway and bus fare increase, toll increases on bridges and tunnels, and an increase in parking charges without first completing a detailed statement on the impacts and consulting other agencies.²³⁵ The District Court for the Southern District of New York denied the plaintiffs’ motion for preliminary injunction, finding that they had failed to show a likelihood of success,²³⁶ irreparable injury,²³⁷ and the balance of hardship favored them.²³⁸ On the issue of likelihood of success, the court allowed that the defendants had not prepared a detailed statement of the environmental consequences of the proposed action and had not submitted the action for consideration by other federal agencies.²³⁹ However, “the Guidelines promulgated under NEPA clearly recognize that there

²²⁸ *Id.* at *18.

²²⁹ *Id.*

²³⁰ *Id.* at *19.

²³¹ *Id.* at *20–21.

²³² *Cohen v. Price Comm’n*, 337 F. Supp. 1236 (S.D.N.Y. 1972).

²³³ *Id.* at 1239.

²³⁴ “The Commission, appointed by the President, functions under the economic Stabilization Act of 1970, as amended in 1971 Its central purpose . . . is to stabilize the economy, reduce inflation, minimize unemployment, protect the purchasing power of the dollar and improve the nation’s competitive position in world trade.” *Id.* at 1240 (citation omitted).

²³⁵ *Id.* at 1239.

²³⁶ *Id.* at 1242.

²³⁷ *Id.* at 1243.

²³⁸ *Id.*

²³⁹ *Id.*

may be emergency situations where the public interest requires immediate and prompt action.”²⁴⁰ The court believed an emergency existed in this case, because “[e]ach week that the proposed price increase was delayed would have endangered the continued viability of New York City’s mass transit system and brought the City closer to total paralysis.”²⁴¹

The court in its holding considered the purpose of the Price Commission and the fact that Congress intended it to act quickly.²⁴² Congress also exempted it from the APA and limited the power of the courts to issue injunctive relief against it.²⁴³ The district court went so far as to say that there was doubt as to the applicability of NEPA to the actions of the Price Commission.²⁴⁴

2. *Sierra Club v. Hassell*²⁴⁵

The Sierra Club and NRDC, private environmental groups, sought an injunction against the Federal Highway Administration, U.S. Coast Guard, and various state agencies, in 1981, claiming that the plaintiffs’ failure to prepare an EIS in connection with the construction of a federally-funded bridge connecting Dauphin Island to mainland Alabama violated NEPA.²⁴⁶ The original bridge had been destroyed in Hurricane Frederic in 1979.²⁴⁷ After the hurricane, the President declared the area to be a major disaster zone, and the Alabama State Highway Department requested federal funds to help restore damaged roads and bridges.²⁴⁸ Dauphin Island was partially developed, with several hundred residents and a number of commercial and military establishments.²⁴⁹ The island also contained substantial wetlands, bird and wildlife habitats, and sites of archaeological importance.²⁵⁰

The District Court for the Southern District of Alabama denied injunctive relief, holding that the defendants complied with NEPA by sufficiently considering potential adverse environmental impacts of the new bridge, alternatives, and mitigation measures.²⁵¹ The Court of Appeals for the

²⁴⁰ *Id.* at 1242.

²⁴¹ *Id.*

²⁴² *Id.* See *supra* note 234 and accompanying text.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Sierra Club v. Hassell*, 636 F.2d 1095 (5th Cir. Unit B 1981).

²⁴⁶ *Id.* at 1097.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1099.

Fifth Circuit affirmed, stating that the agencies were reasonable in finding that an EIS was not necessary.²⁵² The court went on to say that the decision did not mean that it would have been unreasonable or undesirable for the agencies to have classified this as a “major action” under NEPA, as the project’s \$30 million in funding and two year construction period made it look like a “major action.”²⁵³ But the court continued that even if the defendants had determined the project was a “major action,” they still could have found that the action would not have significant effects on the environment and thus avoid the EIS requirement.²⁵⁴ “Alternatively, the agencies might have chosen to prepare an impact statement pursuant to expedited procedures set forth in the regulations for emergency situations.”²⁵⁵ This result does not seem surprising, as the rebuilding of a bridge after a hurricane easily fits within most persons’ conception of an emergency.²⁵⁶

3. South Carolina v. O’Leary²⁵⁷

In July 1993, the Secretary of Energy proposed a three-tiered method to deal with the Department of Energy’s (DOE) recent cessation of receipt of foreign reactor spent fuel.²⁵⁸ First, the DOE would do an EIS for the long-term plan for selecting a site and constructing a facility to receive 24,000 spent fuel rods from European research reactors.²⁵⁹ Second, the DOE would prepare an EA relating to the immediate shipment of a few hundred spent fuel rods to an existing site in South Carolina.²⁶⁰ Lastly, the DOE would ask for and receive declaration of an emergency situation under 40 C.F.R. § 1506.11 for reactor facilities whose situation was so urgent that they could not wait for EA completion.²⁶¹

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*; 23 C.F.R. § 771.11 (2011); 40 C.F.R. § 1508.13(2011).

²⁵⁵ *Hassel*, 636 F.2d at 1099; 23 C.F.R. § 771.16 (2011); 40 C.F.R. § 1506.11 (2011).

²⁵⁶ See discussion *supra* Part II.E (discussing emergency action after Hurricane Katrina).

²⁵⁷ *South Carolina v. O’Leary*, 64 F.3d 892 (4th Cir. 1995).

²⁵⁸ *Id.* Part of the United States’ longstanding policy for the nonproliferation of nuclear weapons was the practice of encouraging foreign nuclear reactors to convert from the use of highly-enriched uranium, which may also be used to make nuclear weapons, to the use of low-enriched uranium, which cannot be used to make weapons. *Id.* at 894–95. Under this program, the United States would accept highly-enriched spent nuclear rods from European research facilities for storage in the United States and, in turn, supply nuclear fuel to these facilities. *Id.* The United States would reprocess the spent fuel rods for use in research reactors or the U.S. nuclear weapon program. *Id.* At the end of the Cold War, the United States stopped reprocessing spent fuel rods but continued to permanently store spent fuel rods. *Id.*

²⁵⁹ *Id.* at 895.

²⁶⁰ *Id.*

²⁶¹ *Id.*

After preparation of the EA, which was released in April 1994, the DOE determined that 409 rods were in urgent need of shipment and that there would be no significant environmental impact if shipped to the South Carolina site.²⁶² In September 1994, South Carolina filed for an injunction to halt the shipment of the 409 rods, saying that the EA was inadequate and an EIS was needed.²⁶³ The district court granted the injunction.²⁶⁴ However, as 153 of the rods were already onboard vessels in the Atlantic Ocean, the Court of Appeals for the Fourth Circuit stayed the injunction on September 23, 1994, holding that South Carolina had failed to show harm sufficient to outweigh the United States' foreign policy interest in receiving the spent fuel rods.²⁶⁵ In January 1995, the district court issued a permanent injunction for further shipments, stating that the DOE had improperly segmented the receipt of 24,000 rods.²⁶⁶ However, the Fourth Circuit once again went against the district court, reversing its judgment and injunction.²⁶⁷ Interestingly, the Fourth Circuit, without discussing 40 C.F.R. § 1506.11, concluded that the DOE had fulfilled its responsibilities under NEPA by doing an EA.²⁶⁸

4. *NRDC v. Pena*²⁶⁹

Pena centered on proposed DOE action concerning its Stockpile Stewardship and Management (SSM) Program.²⁷⁰ The DOE planned to reestablish plutonium pit production at Los Alamos National Laboratory in New Mexico and initiate construction and operation of the National Ignition Facility at Lawrence Livermore National Laboratory in California in order to further the SSM Program's goal of ensuring the safety and reliability of the nation's aging nuclear weapons.²⁷¹ In November 1996, the DOE published its final programmatic EIS (PEIS) for the SSM Program.²⁷² One month later, the Secretary of Energy signed the Record of Decision memorializing the DOE's decision to move forward on the SSM Program as planned.²⁷³

The plaintiffs, more than thirty public interest organizations concerned about environmental waste and nuclear proliferation, filed suit in May 1997,

²⁶² *Id.*

²⁶³ *Id.* at 896.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 900.

²⁶⁸ *Id.*

²⁶⁹ *NRDC v. Pena*, 20 F. Supp. 2d 45, 46 (D.D.C. 1998).

²⁷⁰ *Id.* at 46.

²⁷¹ *Id.*

²⁷² *Id.* at 47.

²⁷³ *Id.*

claiming that the PEIS failed to address the DOE's entire proposed SSM plan and that it failed to vigorously explore and objectively evaluate reasonable alternatives to the SSM Program.²⁷⁴ The plaintiffs filed a motion for preliminary injunction seeking to enjoin the construction of new facilities and major upgrades to mission capabilities.²⁷⁵ In August 1997, the District Court for the District of Columbia denied the plaintiffs' motion on grounds that the plaintiffs did not appear likely to succeed on the merits and that national security interests associated with implementing the SSM Program outweighed the plaintiffs' immediate environmental concerns.²⁷⁶

Then, in January 1998, the plaintiffs filed a motion for leave to amend the complaint to assert the requirement of a supplemental programmatic EIS (SPEIS) necessitated by the discovery of new information concerning potential environmental hazards at the Los Alamos and Livermore facilities.²⁷⁷ In response, the defendants prepared two supplemental analyses under DOE's NEPA regulations.²⁷⁸ Based on these, the DOE finally determined that no SPEIS was required.²⁷⁹ The parties entered into settlement negotiations but were unable to resolve all issues.²⁸⁰ However, the defendants retracted their earlier position that no SPEIS was required and offered to prepare another supplement analysis concentrating on implementation of plutonium pit production at Los Alamos and, if certain conditions were met, to prepare an SPEIS.²⁸¹ Additionally, the DOE stated that it did not intend to conduct certain of the previously proposed experiments using highly toxic substances and explosives earlier than 2007.²⁸²

Over the plaintiffs' argument that the defendants' proposal was merely a delay tactic, the district court dismissed the plaintiffs' complaint, because the issues presented were no longer ripe for adjudication.²⁸³ The court found the defendants' proposal was made in good faith and stated that if the CEQ "issues

²⁷⁴ *Id.* at 47–48.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 48.

²⁷⁷ *Id.* It specifically alleged that the new information about recent scientific studies and independent review by the Defense Nuclear Facilities Safety Board revealing serious seismic and safety risks associated with Los Alamos, the DOE's recent decision to use weapon grade plutonium in the same building as plutonium 238, increasing the chances of plutonium fires like those that occurred at Rocky Flats, a new congressionally mandated plan to design and build larger pit production facilities at multiple sites, and new proposals to conduct experiments at Livermore using hazardous and radioactive materials. *Id.*

²⁷⁸ *Id.*; 10 C.F.R. 1021.314(c) (2012).

²⁷⁹ *Pena*, 20 F. Supp. 2d at 48.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 49.

²⁸³ *Id.* at 49.

an exemption to DOE pursuant to 40 C.F.R. § 1506.11 on national security emergency grounds for any of the actions identified in this Order, DOE may begin implementation of such exempted action before completing the NEPA document required by this Order.”²⁸⁴ It is interesting to note that the court seems to have raised the issue of the emergency exception *sua sponte* and that the court referred to it as a “national security emergency” exception, despite the regulation’s lack of such language.²⁸⁵

5. Miccosukee Tribe of Indians of Florida v. United States²⁸⁶

In this 2007 case, the plaintiff, the Miccosukee Tribe,²⁸⁷ challenged a series of water management decisions made by the U.S. Army Corps of Engineers, one of the defendants, which decisions were designed to avoid harm to the endangered Cape Sable Seaside Sparrow in the Everglades National Park, while at the same time administering Congressionally authorized programs²⁸⁸ aimed at balancing the water needs of Florida.²⁸⁹ One of the water delivery methods had negative effects on the sparrow population in the Everglades, which caused the FWS to ask the Army Corps of Engineers to reduce water levels in the nesting habitat.²⁹⁰ The Army Corps of Engineers requested and received approval from the CEQ for emergency alternative arrangements and deviated from its current operations.²⁹¹ Part of the alternative arrangement was that it would prepare an EA after it began its new course of operations and that it would ultimately prepare an EIS for longer-term plans.²⁹² The Draft EIS was issued in February 2001, and after the public comment period and meetings, the Corps issued the Supplemental EIS, choosing to implement an alternative that had not even been in the Draft EIS.²⁹³ The Final EIS, including the new alternative, was issued in May 2002, and the Record of Decision was published 3 July 2002.²⁹⁴

²⁸⁴ *Id.* at 50.

²⁸⁵ *Id.*; 40 C.F.R. § 1506.11 (2011).

²⁸⁶ *Miccosukee Tribe of Indians of Florida v. United States*, 509 F. Supp. 2d 1288 (S.D. Fla. 2007).

²⁸⁷ *Id.* Intervenors were NRDC, Florida Wildlife Federation, Izaak Walton League of America, National Park Conservation Association, National Wildlife Federation, the Sierra Club, and the Cape Sable Seaside Sparrow (the sparrows were dismissed for lack of standing). *Id.* at 1289.

²⁸⁸ *Id.* at 1290. See generally Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1171 (1948) (containing legislation regarding The Central and Southern Florida Project for Flood Control and Other Purposes); U.S. ARMY CORPS OF ENG’RS, COMPREHENSIVE REPORT ON CENTRAL & SOUTHERN FLORIDA FOR FLOOD CONTROL PURPOSES, H.R. DOC. 80-643 (1948).

²⁸⁹ *Miccosukee*, 509 F. Supp. 2d at 1290.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1289.

²⁹² *Id.* at 1291.

²⁹³ *Id.*

²⁹⁴ *Id.*

The plaintiffs filed suit in September 2002, alleging violations of both NEPA and the ESA.²⁹⁵ The District Court for the Southern District of Florida granted summary judgment in favor of the plaintiffs on the NEPA issue, dismissing all the others, and ordered the Corps to do a supplemental EIS that included the changes.²⁹⁶ The Corps did so, and the Final Supplemental EIS was issued on 21 December 2006.²⁹⁷ In March 2007, the district court asked the parties if any issues remained, and the plaintiffs filed this suit for injunctive relief, alleging that the Final Supplemental EIS was inadequate.²⁹⁸ The district court denied the motion, holding that the plaintiffs failed to show that it was inadequate, a requirement to issuing an injunction.²⁹⁹

In this case, the issue of whether an emergency exception existed that justified the grant of alternative arrangements to completing a full EIS before the Corps' initial plans took place was not discussed by the court, not having been challenged by the plaintiffs.³⁰⁰ But it can serve as an illustration of what may constitute "emergency"—the possible destruction of the habitat of an endangered species.³⁰¹

6. *Hale v. Norton*³⁰²

In 2002, the plaintiffs purchased 410 acres of land in Alaska.³⁰³ The property was surrounded by Wrangell-St. Elias National Park and Preserve, and access to the property was by way of a road that the State of Alaska had classified as abandoned in 1938.³⁰⁴ In the spring of 2003, the Hales' house on the property burned down, and in the rebuilding, the Hales used a bulldozer on the road in order to transport building material, without getting authorization from the National Park Service (NPS).³⁰⁵ In July 2003, the plaintiffs contacted the NPS about obtaining a permit to use the road.³⁰⁶ The NPS responded promptly, offering assistance in the preparation of the permit application.³⁰⁷ In

²⁹⁵ *Id.* The plaintiffs also alleged violations of the APA, Fifth Amendment due process, the Indian Trust doctrine, the Federal Advisory Committee Act, as well as nuisance under federal common law and improper delegation of agency authority. *Id.*

²⁹⁶ *Id.* at 1291–92. See *Miccosukee Tribe of Indians v. United States*, 420 F. Supp. 2d 1324 (S.D. Fla. 2006).

²⁹⁷ *Miccosukee*, 509 F. Supp. 2d at 1292.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1295.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1290.

³⁰² *Hale v. Norton*, 476 F.3d 694 (9th Cir. 2007).

³⁰³ *Id.* at 696.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

September 2003, the Hales submitted an “emergency” application, saying that they needed to get their supplies in before the “freeze up.”³⁰⁸ The NPS asked for more information about the nature of the emergency, and also pointed out that others in the area are able to use bulldozers in the winter months, and in fact, the frozen ground helps protect the land.³⁰⁹ Since the Hales wanted to travel on unfrozen ground, which causes significantly more damage, the NPS informed them that an EA would need to be done.³¹⁰ The NPS also told the Hales that it did not see this as falling within the emergency exception to NEPA.³¹¹ The NPS offered to complete the EA in nine weeks and cover the costs itself but required that the Hales provide more information.³¹² The Hales did not respond, instead filing suit in November 2003.³¹³

The District Court for the District of Alaska denied the motion for injunction and dismissed the case for lack of subject matter jurisdiction.³¹⁴ The Court of Appeals for the Ninth Circuit held that there was subject matter jurisdiction but upheld the denial of injunctive relief, holding that the NPS had acted reasonably in requiring an EA.³¹⁵ While the Ninth Circuit did not discuss whether 40 C.F.R. § 1506.11 could have been used to relieve the NPS of some of the requirements of NEPA, the case is useful to show what an agency considers to be an “emergency.”³¹⁶ Moreover, even if a court thought that the agency was wrong and that the plaintiffs’ situation did constitute an emergency, it is doubtful that they would have found the NPS’s actions as unreasonable, given the deference normally shown to agency decisions.³¹⁷

IV. Navy MFA Sonar Cases

A. Training and MFA

The Fleet Response Training Plan (FRTP) is one of the Navy’s ways to comply with the Chief of Naval Operation’s obligation under 10 U.S.C. § 5062

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 697.

³¹³ *Id.* The plaintiffs sought an injunction requiring the NPS to provide adequate access to their property and a declaratory judgment stating that the NPS had violated their right-of-way over the road by requiring a permit and that issuing a permit for the road did not constitute major federal action subject to NEPA requirements. *Id.*

³¹⁴ *Id.* The court held that there was no final agency action that permitted review under the Administrative Procedure Act, 5 U.S.C. § 704. *Id.*

³¹⁵ *Hale*, 476 F.3d at 700–01.

³¹⁶ *Id.*

³¹⁷ See *supra* note 197 and accompanying text.

to organize, train, and equip all naval forces for combat.³¹⁸ The FRTP is an arduous training cycle that ensures that naval forces achieve the highest possible readiness levels before deploying.³¹⁹ As a part of the FRTP, the Navy engages in Composite Training Unit Exercises (COMPTUEX) and Joint Task Force Exercises (JTFEX) in order to achieve this required readiness.³²⁰ Both COMPTUEX and JTFEX are included in the integrated phase of training for U.S. and some allied forces, requiring a synthesis of both individual units and staff into a coordinated strike group prepared for surge and readiness certification.³²¹

Anti-submarine warfare is the Pacific Fleet's top war-fighting priority and essential to the nation's defense.³²² Today's quiet, diesel-electric submarines have state-of-the-art sound silencing and sound isolation technologies.³²³ Moreover, they use advanced propulsion systems that include high endurance battery systems and air-independent propulsion systems.³²⁴ These advances, together with special hull treatments that significantly dampen the noise they produce and reduce their vulnerability to active sonar prosecution, make submarines highly potent adversaries.³²⁵ Detecting, identifying, tracking, and, if required, neutralizing these diesel-electric submarines is vitally important to the U.S. Navy's ability to conduct operations and ultimately prevail in conflict.³²⁶

These diesel-electric submarines can operate covertly in coastal waters and open oceans, blocking the Navy's access to combat zones and increasing American vessels' vulnerability to torpedo and anti-ship missile attacks.³²⁷ Submarines are operated by a number of navies, including potential adversaries in the Asia-Pacific and Middle East areas. U.S. Navy strike groups are continuously deployed to these high-threat areas.³²⁸ In preparing for these missions, the thousands of service members that comprise a Pacific Fleet strike group must train in the use of MFA sonar—the Navy's primary submarine tracking system—in a coordinated manner, in a realistic environment, prior to

³¹⁸ 10 U.S.C. § 5062 (2006 & Supp. IV 2010); Decision Memorandum Accepting Alternative Arrangements for the U.S. Navy's Southern California Operating Area Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) Scheduled To Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4189 (Jan. 24, 2008) [hereinafter Navy's Acceptance].

³¹⁹ Navy's Acceptance, 73 Fed. Reg. at 4189.

³²⁰ *Id.* at 4189–90.

³²¹ *Id.* at 4190.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

deployment.³²⁹ The Southern California Operating Area is uniquely suited to COMPTUEX and JTFEX, because it contains all the land, air, and at-sea bases necessary for conducting the exercises and its shallow coastal areas realistically simulate areas where the Navy is likely going to encounter hostile submarines.³³⁰

MFA sonar emits pulses of sound from an underwater transmitter in order to determine the size, distance, and speed of objects in the water.³³¹ The sound waves bounce off objects and reflect back as an echo to underwater acoustic receivers.³³² It has a range up to ten nautical miles³³³ and operates within the 1 kHz to 10 kHz frequency range.³³⁴ MFA sonar has been in use since World War II and “is the only reliable way to identify, track, and target submarines.”³³⁵ Active sonar is different from passive sonar in that passive sonar only receives sound waves; it does not emit them.³³⁶ According to the Navy, passive sonar is ineffective at detecting quiet submarines, such as those that run on batteries.³³⁷

Scientists have suggested that MFA sonar may harm certain marine mammals, especially beaked whales. Opponents of MFA sonar point out that it is emitted at 170 to 195 decibels, a level approximately eight to ten times louder than the levels for which the Occupational Safety & Health Administration requires hearing protection for humans.³³⁸ However, this may be an unfair comparison, as noise intensities in air and water differ due to their differing densities.³³⁹ Nonetheless, excessive noise can damage the ears of mammals or can disorient the animals so that they surface too quickly, giving them a potentially fatal case of the “the bends,” a condition caused by the rapid release of nitrogen from solution in the blood.³⁴⁰ Strandings are also a possible effect of noise.³⁴¹

The Navy agrees that sonar can harm marine mammals under some circumstances but argues that it takes additional protective measures to avoid

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See ALEXANDER, *supra* note 5, at 1.

³³² *Id.*

³³³ *Id.*

³³⁴ Navy’s Acceptance, 73 Fed. Reg. at 4190.

³³⁵ ALEXANDER, *supra* note 5, at 1 (citing sources at the Navy).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ 29 C.F.R. § 1910.95(a) (2011); ALEXANDER, *supra* note 5, at 1.

³³⁹ ALEXANDER, *supra* note 5, at 1.

³⁴⁰ *Id.*

³⁴¹ *Id.*

such harm.³⁴² In a 20 December 2007 article, the Navy stated that it takes twenty-nine mitigation measures to protect marine mammals during military exercises involving sonar and that no injuries to marine mammals have been attributed to sonar use since the measures were put in place in January 2007.³⁴³

The habitat and species contained in the Southern California Operating Area have been monitored over the last forty years, the same time period during which the Navy has used MFA sonar.³⁴⁴ There have been no documented incidents of harm, injury, death, or stranding of marine mammals resulting from their exposure to MFA sonar.³⁴⁵ No systematic declines in marine mammal stocks have occurred, and in fact, the stocks of many species, such as the blue and humpback whales, harbor seals, and common dolphins, are either stable or improving.³⁴⁶ Strandings of small cetaceans and California sea lions are common, usually attributed to fishery interaction, disease, or harmful algae blooms.³⁴⁷ There have been several individual beaked whale strandings, and these are also usually caused by fishery interaction or disease.³⁴⁸ While the causes of some of these strandings are unknown, there has been no apparent link to MFA sonar.³⁴⁹

B. Winter v. NRDC³⁵⁰ Litigation History

In order to understand the Navy's invocation of 40 C.F.R. § 1506.11, it is important to sift through the procedural history of the case leading up to its being heard by the U.S. Supreme Court.

³⁴² *Id.*

³⁴³ *Id.* at 1–2; Kristen Noel, *Navy Invests in Protecting Marine Mammals*, NAVY.MIL (Dec. 20, 2007), http://www.navy.mil/search/print.asp?story_id=34061&VIRIN=&imagetype=0&page=1. The.

³⁴⁴ Decision Memorandum Accepting Alternative Arrangements for the U.S. Navy's Southern California Operating Area Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) Scheduled To Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4190 (Jan. 24, 2008) [hereinafter Navy's Acceptance].

³⁴⁵ *Id.*

³⁴⁶ *Id.* The Eastern North Pacific gray whale stock increased and the species was removed from the Endangered/Threatened Species List, but unfortunately is currently experiencing habitat changes due to ice melting patterns. *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ NRDC v. Winter, No. CV 06-4131 FMC (JCx), 2006 U.S. Dist. LEXIS 97385 (C.D. Cal. July 5, 2006), *injunction granted by* 645 F. Supp. 2d 841 (C.D. Cal.), *stay granted by* 502 F.3d 859 (9th Cir. 2007), *stay vacated*, 508 F.3d 885 (9th Cir.), *remanded to and injunction modified by* 530 F. Supp. 2d 1110 (C.D. Cal.), *stay denied and remanded by* 513 F.3d 920 (9th Cir.), *stay denied by* 527 F. Supp. 2d 1216 (C.D. Cal.), *stay denied by* 516 F.3d 1103 (9th Cir.), *aff'd*, 518 F.3d 658 (9th Cir.), *injunction modified and stay granted, in part, by* 518 F.3d 704 (9th Cir.), *rev'd*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

NRDC's allegation that the Navy's use of sonar has negatively impacted marine mammals has been repeated for several years, with litigation relating to the Navy's use of low-frequency sonar beginning in 2003.³⁵¹ Low-frequency sonar litigation was most recently before the District Court for the Northern District of California and was settled in 2008.³⁵²

The challenge to the Navy's use of MFA sonar was first raised before the District Court for the Central District of California in 2006.³⁵³ The lead plaintiff in the MFA case was the NRDC,³⁵⁴ a non-governmental environmental group, whose mission is “[t]o safeguard the Earth: its people, plants and animals and the natural systems on which all life depends.”³⁵⁵ Four other environmental groups—the International Fund for Animal Welfare, the Cetacean Society International, the League for Coastal Protection, and Ocean Futures Society—were the plaintiffs, along with Jean-Michel Cousteau, son of famed oceanographer Jacques Cousteau.³⁵⁶ The defendants were the Secretary of the Navy, Secretary of Commerce, the National Marine Fisheries Service, the Assistant Administrator for Fisheries of the National Oceanographic and Atmospheric Administration (NOAA), and the Administrator of NOAA.³⁵⁷ The plaintiffs claimed that the Navy had violated the ESA, the Coastal Zone Management Act (CZMA), and NEPA.³⁵⁸

³⁵¹ NRDC first sued the Navy over low-frequency active sonar in 2003. *NRDC v. Evans*, 364 F. Supp. 2d 1083 (N.D. Cal. 2003), *appeal dismissed*, *NRDC v. Gutierrez*, 457 F.3d 904 (9th Cir. 2006). However, NRDC claims that it first brought the issue of ocean noise to the public's awareness in 1995. Reynolds, *supra* note 146, at 775. Also, NRDC sued the Navy in 1994 for “ship shock.” *NRDC v. U.S. Dept. of the Navy*, 857 F. Supp. 734 (C.D. Cal. 1994), *injunction vacated and consent decree entered*, No. CV 94-2337-SVW (CTx), 1994 U.S. Dist. LEXIS 21630 (C.D. Cal. May 5, 1994).

³⁵² Stipulated Settlement Agreement Order, *NRDC v. Gutierrez*, No. C-07-4771-EDL (N.D. Cal. Aug. 12, 2008) (order approving the settlement agreement wherein the Navy agreed to limit low-frequency sonar training to certain areas of the Pacific Ocean, rather than the worldwide scope as originally planned).

³⁵³ *NRDC v. Winter*, No. CV 06-4131 FMC (JCx), 2006 U.S. Dist. LEXIS 97385 (C.D. Cal. July 5, 2006). MFA sonar was also at issue in the District Court of Hawaii in *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960 (D.C. Haw. 2008).

³⁵⁴ *NRDC v. Winter*, No. CV 06-4131 FMC (JCx), 2006 U.S. Dist. LEXIS 97385 (C.D. Cal. July 5, 2006).

³⁵⁵ *About the Natural Resources Defense Counsel*, NRDC, <http://www.nrdc.org/about> (last visited Mar. 21, 2012).

³⁵⁶ Brief for the Petitioners at II, *Winter v. NRDC*, 555 U.S. 7 (2008) (No. 07-1239).

³⁵⁷ *Id.*

³⁵⁸ *NRDC v. Winter*, 645 F. Supp. 2d 841, 846 (C.D. Cal.), *stay granted by* 502 F.3d 859 (9th Cir. 2007), *stay vacated*, 508 F.3d 885 (9th Cir.), *remanded to and injunction modified by* 530 F. Supp. 2d 1110 (C.D. Cal.), *stay denied and remanded by* 513 F.3d 920 (9th Cir.), *stay denied by* 527 F. Supp. 2d 1216 (C.D. Cal.), *stay denied by* 516 F.3d 1103 (9th Cir.), *aff'd*, 518 F.3d 658 (9th Cir.), *injunction modified and stay granted, in part, by* 518 F.3d 704 (9th Cir.), *rev'd*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

Mid-litigation, in February 2007, the Navy prepared an EA under NEPA, finding that there were no significant adverse effects on the environment necessitating the preparation of an EIS.³⁵⁹ However, it did conclude that the training exercises could cause 170,000 “takes” under the ESA,³⁶⁰ to include 466 permanent injuries to beaked and ziphiid whales, some of which are endangered.³⁶¹

On 6 August 2007, the district court granted the plaintiffs’ request for a preliminary injunction to halt the remaining planned Navy training exercises in the Southern California Range through January 2009.³⁶² In doing so, the court focused on NRDC’s claims brought under CZMA and NEPA.³⁶³ As neither provides a right to sue, the court reviewed these claims under the standard set by the APA—whether the agency action was arbitrary and capricious.³⁶⁴ Despite this high standard of review, the court found that NRDC would likely succeed on its claims under CZMA and NEPA, though not on those brought under ESA.³⁶⁵ With regard to the NEPA claims, the district court said that the plaintiffs had showed a probability of success in their claim that the Navy should have prepared an EIS based on its findings presented in the February 2007 EA and that the Navy did not adequately review alternatives to its training plan.³⁶⁶

The Navy appealed, and on 31 August 2007, the Ninth Circuit Court of Appeals stayed the injunction and ordered an expedited briefing.³⁶⁷ In November, after the briefing, the Ninth Circuit vacated the stay, again enjoining the Navy from conducting MFA exercises, and remanded the case to the district

³⁵⁹ Brief for the Petitioners at 8–10, *Winter*, 555 U.S. 7 (No. 07-1239).

³⁶⁰ “Take,” under the ESA, means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (2006 & Supp. IV 2010).

³⁶¹ *Winter*, 645 F. Supp. 2d at 845–46.

³⁶² *Id.* at 855. There were fourteen total exercises in COMPTUEX and JTFEX. *Id.*

³⁶³ *Id.* at 851–55.

³⁶⁴ 5 U.S.C. § 706(2) (2006 & Supp. IV 2010).

³⁶⁵ *Winter*, 645 F. Supp. 2d at 851–55.

³⁶⁶ *Id.* at 851. The court also found that it was likely that the Navy violated CZMA. *Id.* at 854. According to the Navy, the MFA training was consistent with the state Coastal Management Program, because it would not affect California’s coastal resources, and the Navy did not need to adopt the mitigation measures California deemed necessary. *Id.* at 853. The court suggested that the Navy’s determination that its exercises would not harm coastal resources could be found arbitrary and capricious. *Id.*

³⁶⁷ NRDC v. Winter, 502 F.3d 859, 865 (9th Cir. 2007) *stay vacated*, 508 F.3d 885 (9th Cir.), *remanded to and injunction modified by* 530 F. Supp. 2d 1110 (C.D. Cal.), *stay denied and remanded by* 513 F.3d 920 (9th Cir.), *stay denied by* 527 F. Supp. 2d 1216 (C.D. Cal.), *stay denied by* 516 F.3d 1103 (9th Cir.), *aff’d*, 518 F.3d 658 (9th Cir.), *injunction modified and stay granted, in part, by* 518 F.3d 704 (9th Cir.), *rev’d*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

court with direction to narrow the scope of the preliminary injunction by allowing the Navy to carry out exercises subject to appropriate conditions tailored to mitigate potential harm.³⁶⁸

On 3 January 2008, the district court again issued a preliminary injunction, containing seven specific mitigation measures.³⁶⁹ Those measures were: a 12-nautical mile coastal exclusion zone; a 2200-yard MFA sonar shut down; monitoring; use of helicopter dipping sonar; a reduction of MFA sonar decibels when surface ducting conditions are found; no MFA sonar use in the Catalina basin, a “choke point” for animals; and continued use of mitigation measures from the 2007 National Defense Exemption from the Requirements of the MMPA.³⁷⁰

On 9 January 2008, the Navy asked the district court to stay its decision pending appeal.³⁷¹ The district court again narrowed the mitigation measures and issued a modified preliminary injunction on 10 January 2008.³⁷²

That same day, the Navy asked the CEQ for alternative arrangements under 40 C.F.R. § 1506.11 that would allow it to conduct the remaining training exercises as scheduled while an EIS was being completed.³⁷³ The CEQ said the Navy indicated that two of the mitigation measures required by the district court would “create a significant and unreasonable risk that strike groups will not be able to train and be certified as fully mission capable.”³⁷⁴ Then-Chief of Naval Operations, Admiral Gary Roughead, explained that “[t]he southern California operating area provides unique training opportunities that are vital to prepare our forces, and the planned exercises cannot be postponed without impacting national security.”³⁷⁵ On 15 January 2008, the CEQ provided alternative

³⁶⁸ *Winter*, 508 F.3d at 887.

³⁶⁹ *Winter*, 530 F. Supp. 2d at 1118–21.

³⁷⁰ *Id.*; Memorandum for Secretary of the Navy, Gordon R. England, Deputy Sec'y of Def., subject: National Defense Exemption from Requirements of the Marine Mammal Protection Act for Certain DoD Military Readiness Activities That Employ Mid-Frequency Active Sonar or Improved Extended Echo Ranging Sonobuoys (Jan. 23, 2008), available at https://acc.dau.mil/adl/en-US/188526/file/32406/England_Memo_1_23_07.pdf.

³⁷¹ *Winter*, 513 F.3d at 921.

³⁷² *Id.*

³⁷³ Letter from James L. Connaughton, Chairman, Council on Env'l. Quality, to Donald C. Winter, Sec'y of the Navy (Jan. 15, 2008) (on file with author).

³⁷⁴ *Id.*

³⁷⁵ News Release, Dep't of Def., Navy Granted Authority to Use Sonar in Training off California (Jan. 16, 2008) (on file with author), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11622>.

arrangements that paralleled the 2007 National Defense Exemption mitigation measures.³⁷⁶

Also on 15 January 2008, the President of the United States exempted the Navy exercises from compliance with CZMA, using the authority under 16 U.S.C. § 1456(c)(l)(B).³⁷⁷ The President determined that the use of MFA sonar in the exercises was “in the paramount interest of the United States” and the training and certification of carrier and expeditionary strike groups was “essential to national security.”³⁷⁸

Based on these two exemptions, the Navy went back to the Ninth Circuit and asked it to vacate the injunction.³⁷⁹ The Ninth Circuit remanded the action to the district court on 16 January 2008 for it to determine the effects of these developments on the preliminary injunction.³⁸⁰

On 4 February 2008, the district court held that the CEQ’s action was beyond the scope of the regulation and was, therefore, invalid.³⁸¹ It also held that when 40 C.F.R. § 1506.11 was drafted the CEQ used the phrase “emergency circumstances” to refer to “sudden, unanticipated events, not the unfavorable consequences of protracted litigation. The CEQ’s contrary interpretation in this case is ‘plainly erroneous and inconsistent’ with the regulation and, concomitantly, not entitled to deference.”³⁸² The court held that the Navy must comply with NEPA, the injunction remained in place, and the Navy could conduct MFA training only if it employed the ordered mitigation measures.³⁸³ The court stated that the public interest was best served by requiring those mitigation measures, as they allowed the Navy to conduct training while limiting the harm to natural resources.³⁸⁴ The district court questioned the constitutionality of the President’s CZMA exemption but did not

³⁷⁶ *Id.* See England, *supra* note 370.

³⁷⁷ News Release, Dep’t of Def., *supra* note 375.

³⁷⁸ NRDC v. Winter, 527 F. Supp. 2d 1216, 1224 (C.D. Cal.), *stay denied* by 516 F.3d 1103 (9th Cir.), *aff’d*, 518 F.3d 658 (9th Cir.), *injunction modified and stay granted, in part*, by 518 F.3d 704 (9th Cir.), *rev’d*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

³⁷⁹ NRDC v. Winter, 513 F.3d 920, 921 (9th Cir.), *stay denied* by 527 F. Supp. 2d 1216 (C.D. Cal.), *stay denied* by 516 F.3d 1103 (9th Cir.), *aff’d*, 518 F.3d 658 (9th Cir.), *injunction modified and stay granted, in part*, by 518 F.3d 704 (9th Cir.), *rev’d*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

³⁸⁰ *Id.* at 922.

³⁸¹ *Winter*, 527 F. Supp. 2d at 1219.

³⁸² *Id.* at 1229.

³⁸³ *Id.* at 1232.

³⁸⁴ *Id.* at 1239.

rule on it, because it was satisfied that the injunction stood firmly on NEPA grounds.³⁸⁵

The Navy sought to have the injunction stayed, since the next scheduled exercises were to begin in March; the Ninth Circuit denied the request.³⁸⁶ Then on 29 February 2008, the Ninth Circuit rejected the Navy's appeal of the preliminary injunction.³⁸⁷ The Ninth Circuit found that the district court did not abuse its discretion in finding that the CEQ's interpretation of emergency circumstances was overly broad.³⁸⁸ The Ninth Circuit stated that as the Navy had more than a year's notice that it may be required to prepare an EIS and that it was likely to lose on the merits of the NEPA claim, the litigation leading to the injunction was "a series of events [that] gives rise to a predictable outcome, and not an unforeseeable one demanding unusual or immediate action."³⁸⁹

In a separate opinion, the Ninth Circuit modified two of the mitigation measures required by the district court based on the Navy's new argument that two of the measures would significantly limit its ability to conduct anti-submarine training and jeopardize its ability to certify its strike groups as ready for deployment.³⁹⁰ The Ninth Circuit modified the 2,200-yard suspension during "critical point[s] in the exercise."³⁹¹ Under the modified provision, the Navy would be required to reduce the sonar decibel level based on the distance from the sonar source at which a marine mammal was detected, as follows: a reduction of 6 decibels for a mammal within 1,000 meters, a reduction of 10 decibels for a mammal within 500 meters, and a reduction to 0 decibels for mammals within 200 meters.³⁹² The second modification applied when significant surface ducting conditions were detected.³⁹³ Rather than shutting down the training, the Ninth Circuit required the Navy to similarly reduce the decibels of the activity.³⁹⁴ Therefore, the Navy could conduct its training exercises, provided it used the new mitigation measures indicated by the court, along with the other undisputed measures.

³⁸⁵ *Id.* at 1237–38.

³⁸⁶ NRDC v. Winter, 516 F.3d 1103, 1106 (9th Cir.), *aff'd*, 518 F.3d 658 (9th Cir.), *injunction modified and stay granted, in part, by* 518 F.3d 704 (9th Cir.), *rev'd*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

³⁸⁷ NRDC v. Winter, 518 F.3d 658, 703 (9th Cir.), *rev'd*, 555 U.S. 7 (2008), *remanded to* 560 F.3d 1027 (9th Cir. 2009).

³⁸⁸ *Id.* at 680.

³⁸⁹ *Id.* at 682.

³⁹⁰ *Winter*, 518 F.3d at 705.

³⁹¹ *Id.* at 705–06.

³⁹² *Id.*

³⁹³ *Id.* at 706.

³⁹⁴ *Id.* at 706.

The Navy petitioned for a writ of certiorari from the U.S. Supreme Court to review the Ninth Circuit decision,³⁹⁵ and the petition was granted.³⁹⁶ The Navy raised two issues: whether the CEQ permissibly construed its own regulation in finding emergency circumstances and whether the injunction based on NEPA violations was appropriate.³⁹⁷ The injunction argument disputed the lower court's balancing of the public interest in protecting marine mammals against the public interest in national defense.³⁹⁸

Regarding the CEQ's finding that an emergency circumstance did exist, the petitioners argued that the CEQ's regulations are entitled to substantial deference³⁹⁹ and that the CEQ's interpretation of the term "emergency circumstance" in the regulation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation itself."⁴⁰⁰ According to petitioners, and strongly contested by respondents in lower court proceedings,⁴⁰¹ the definition of "emergency" does not just mean unexpected or unforeseen—it is an urgent circumstance demanding prompt action.⁴⁰²

[A]n 'emergency situation' exists when an immediate response is needed to avert a significant impending harm to the public interest, and for that reason, '[a]n assessment of blame regarding [the cause] of the predicament . . . is quite

³⁹⁵ Reply Brief for the Petitioners, *Winter v. NRDC*, 555 U.S. 7 (2008) (No. 07-1239).

³⁹⁶ *Winter v. NRDC*, 554 U.S. 916 (2008).

³⁹⁷ Brief for the Petitioners at I, *Winter*, 555 U.S. 7 (No. 07-1239).

³⁹⁸ *Id.*

³⁹⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355–56 (1989); Brief for the Petitioners at 22, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴⁰⁰ Brief for the Petitioners at 23, *Winter*, 555 U.S. 7 (No. 07-1239) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

⁴⁰¹ Respondents' Brief did not argue the definition of "emergency," but instead argued that CEQ did not have the authority to re-determine a factual issue made by the district court. Brief for the Respondents at 19, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴⁰² Brief for the Petitioners at 24, *Winter*, 555 U.S. 7 (No. 07-1239). See, e.g., THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 313 (1999) (defining "emergency" as "a sudden state of danger, conflict, etc., requiring immediate action"); BLACK'S LAW DICTIONARY 522–23 (6th ed. 1990) (listing multiple definitions for "emergency," including "perplexing contingency or complication of circumstances," "exigency," and "pressing necessity"); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 636 (2d ed. 1987) (defining "emergency" as "[a] situation demanding immediate action," which is "usually unexpected;" "exigency"); WEBSTER'S NINTH NEW COLLEGiate DICTIONARY 407 (1984) (defining "emergency" as "an urgent need for assistance or relief"); THE LIVING WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 321 (1971) (defining "emergency" as "[a] sudden, usu[ally] unexpected, occasion or combination of events calling for immediate action"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 741 (1967) (defining "emergency" as "an usu[ally] distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen").

frankly irrelevant to a determination of whether [the government] is faced with an ‘emergency situation.’⁴⁰³

Respondents contended otherwise in earlier proceedings, arguing that “emergency” requires the event to be unexpected and that this event was not unexpected as the Navy knew since 2006, when the exercises were being planned, that it would need to do an EIS.⁴⁰⁴ In counterpoint, the petitioners argued that a cardiac patient who goes into cardiac arrest as a result of his failure to take heart medication faces no less an “emergency” because the situation could be foreseen or because he may have contributed to its cause.⁴⁰⁵ Examples of anticipated emergencies—like an air traffic controllers’ strike—are easily found in the law.⁴⁰⁶ Moreover, previous cases dealing with 40 C.F.R. § 1506.11 support the view that “emergency” can mean a situation requiring an urgent need for action, even if the situation is of the requesting agency’s own making.⁴⁰⁷

In this case, petitioners argued that the emergency was the district court’s order demanding an EIS before vital military exercises could effectively proceed.⁴⁰⁸ The Navy’s need to carry out its mission in the wake of the Commander-in-Chief’s conclusion that it is critically important to the country’s security constituted a genuine emergency.⁴⁰⁹ Therefore, the petitioners argued, the Ninth Circuit erred when it deferred to the district court’s reading of the regulation and what constitutes an “emergency,” even after the court recognized that it can mean something requiring immediate attention.⁴¹⁰ As petitioners pointed out, the Navy completed a robust EA and concluded in good faith that preparation of an EIS prior to conduct of the training was not necessary.⁴¹¹ Even though the district court found that the Navy’s conclusions were likely wrong, it was very reasonable for the Navy to believe its conclusion was

⁴⁰³ *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 866 (2nd Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); Brief for the Petitioners at 26, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴⁰⁴ Brief for the Respondents at 22, *Winter*, 555 U.S. 7 (No. 07-1239). In lower court filings, Respondents also argued that the case did not turn on the definition of “emergency,” because there was no urgent need since the district court found that the Navy could train and certify its strike groups. *Id.*

⁴⁰⁵ Brief for the Petitioners at 25, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴⁰⁶ *E.g.*, 29 U.S.C. §§ 176, 178 (2006 & Supp. IV 2010); *Letenyei v. Dept of Transp.*, 735 F.2d 528, 531–32 (Fed. Cir. 1984); *United Steelworkers v. United States*, 372 F.2d 922, 924 (D.C. Cir. 1966) (per curiam).

⁴⁰⁷ See *Miccosukee Tribe of Indians v. U.S. Army Corps of Engineers*, 509 F. Supp. 2d 1288 (S.D. Fla. 2007); *Valley Citizens for a Safe Env’t v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863 (D. Mass. May 6, 1991).

⁴⁰⁸ Brief for the Petitioners at 25, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴⁰⁹ *Id.* at 26.

⁴¹⁰ *Id.* at 27.

⁴¹¹ *Id.* at 32.

correct.⁴¹² No emergency arose until the court ruled otherwise and imposed an injunction jeopardizing the Navy's ability to train strike groups for deployment.⁴¹³

During oral arguments, Justice Souter posed the question of whether the Navy created the "emergency" by failing to prepare a timely EIS when it decided to do the exercises and, thus, made the CEQ's emergency exception inapplicable.⁴¹⁴ The answer both by the Government and by Justice Scalia was that the Navy did comply with NEPA in good faith by doing an EA before the exercises began.⁴¹⁵ This was not an emergency because the Navy failed to do an EIS; it was an emergency because despite the fact that the Navy complied with NEPA by doing an EA, it was now being stopped by the district court and Ninth Circuit from conducting the exercises in a way that would properly train its sailors and allow strike groups to be certified.⁴¹⁶

Furthermore, the petitioners argued that even if the Court does not grant the customary deference to the CEQ's interpretation of its own regulation, it should be particularly reluctant to disregard the President's determination concerning the urgency of these training exercises.⁴¹⁷ In fact, during oral arguments before the Supreme Court, Justice Alito asked Mr. Richard B. Kendall, NRDC's attorney: "Isn't there something incredibly odd about a single district judge making a determination on that defense question [whether the injunction will permit the Navy to train and certify its sailors] that is contrary to the determination that the Navy has made?"⁴¹⁸

Besides the disagreement over the proper definition of "emergency," the respondents argued that because the CEQ merely rubber-stamped the Navy's position when it granted the alternative arrangements, its decision was not entitled to deference.⁴¹⁹ They also thought that the CEQ's decision was especially deficient in light of the fact that it has no expertise regarding naval

⁴¹² U.S. Postal Service v. Gregory, 534 U.S. 1, 10 (2001); Brief for the Petitioners at 32, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴¹³ Brief for the Petitioners at 32, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴¹⁴ Transcript of Oral Argument at 18, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴¹⁵ *Id.* at 20.

⁴¹⁶ *Id.* For a non-sonar example of why repeated training in real-world scenarios is vital to the Navy, see Memorandum, Rear Admiral (Upper Half) (RADM) Frank M. Drennan, to Command, U.S. Pacific Fleet, subject: Command Investigation into the Fire that Occurred Onboard USS George Washington (CVN-73) on 22 May 2008 (1 July 2008), available at http://www.cpf.navy.mil/content/foia/washington/FOIA_GW_Fire_investigation.pdf.

⁴¹⁷ Brief for the Petitioners at 26, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴¹⁸ Transcript of Oral Argument at 30, *Winter*, 555 U.S. 7 (No. 07-1239) (indicating Mr. Kendall's answer was "no").

⁴¹⁹ Brief for the Respondents at 32–33, *Winter*, 555 U.S. 7 (No. 07-1239) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962)).

training.⁴²⁰ Interestingly, though, the respondents' thought the district court had sufficient expertise to determine the appropriate level of training.

C. Supreme Court Ruling

1. Majority's Avoidance of the Emergency Exception Issue

The Supreme Court, in a 5–4 opinion, reversed the Ninth Circuit and vacated the injunction to the extent that the Navy had challenged it.⁴²¹ Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito; Justice Breyer concurred in part and dissented in part, joined by Justice Stevens.⁴²² Justice Ginsburg wrote the dissenting opinion, joined by Justice Souter.⁴²³ The majority decided the case solely on the second issue—whether the preliminary injunction was appropriate—and decided it was not.⁴²⁴ The Court focused primarily on the competing interests—NRDC's “ecological, scientific, and recreational interests in marine mammals”⁴²⁵ versus “the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines”⁴²⁶ and held that the Navy's interest “plainly outweighed” NRDC's.⁴²⁷

2. Dissent's Opinion of No Emergency Exception

While the majority steered clear of the issue of whether the CEQ had properly granted alternative arrangements to the Navy under 40 C.F.R. § 1506.11, the dissent spent the majority of its opinion on this issue and an analysis of the purpose behind NEPA.⁴²⁸ If the Navy had followed NEPA and completed the EIS before taking action, the dissent argues both the parties and the public would have benefited from the environmental analysis and the Navy could have proceeded with its training without interruption.⁴²⁹ “Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve.”⁴³⁰ The Navy, in an attempt to justify its actions, sought dispensation not from Congress, but from the CEQ, an executive council that lacks authority to

⁴²⁰ Brief for the Respondents at 32, *Winter*, 555 U.S. 7 (No. 07-1239) (citing Adams Fruit Co., v. Barrett, 494 U.S. 638, 649–50 (1990) (no deference owed to agency acting outside its expertise)).

⁴²¹ *Winter*, 555 U.S. at 12.

⁴²² *Id.* at 10–11.

⁴²³ *Id.* at 11.

⁴²⁴ *Id.* at 33.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 43–51 (Ginsburg, J., dissenting).

⁴²⁹ *Id.* at 43.

⁴³⁰ *Id.*

countermand or revise NEPA's requirements, the dissent continues.⁴³¹ These actions both undermined NEPA and led to "an extraordinary course."⁴³² Had the Navy prepared a legally sufficient EIS before beginning the exercises, NEPA would have functioned in the way intended, and the EIS process, including the opportunity for public input, might have convinced the Navy to voluntarily adopt mitigation measures, and the training would not have been impeded.⁴³³

The dissent also agreed with respondent's argument that the CEQ's decision was conclusory and insufficient to set aside the district court's findings and injunction, because the Navy submitted material to the CEQ that supported only its side and neither the Navy nor the CEQ notified NRDC of the request for alternative arrangements.⁴³⁴ "CEQ's hasty decision on a one-sided record is no substitute for the district court's considered judgment based on a two-sided record."⁴³⁵

Even if the CEQ's review had been exemplary, the dissent felt that the CEQ lacked authority to absolve an agency of its duty under NEPA to prepare an EIS.⁴³⁶ This is a more fundamental problem than the CEQ's granting of alternative arrangements that did not vindicate NEPA's objectives.⁴³⁷ The CEQ was established by NEPA to assist and advise the President on environmental policy,⁴³⁸ and an Executive Order charged the CEQ with issuing regulations for implementation of NEPA's procedural provisions.⁴³⁹ The dissent then argued that although 40 C.F.R. § 1506.11 "indicates that CEQ may play an important consultative role in emergency circumstances, . . . [the Supreme Court has] never suggested that CEQ could eliminate the statute's command."⁴⁴⁰

The dissent also points out that the Navy had the option of requesting authorization from Congress to proceed with planned activities without fulfilling NEPA's requirements.⁴⁴¹ "The Navy's alternative course—rapid, self-serving

⁴³¹ *Id.*

⁴³² *Id.* at 47.

⁴³³ *Id.* at 48.

⁴³⁴ See Brief for the Respondents at 22, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴³⁵ *Id.* at 50.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ 42 U.S.C. § 4342 (2006 & Supp. IV 2010); Brief for the Respondents at 50, *Winter*, 555 U.S. 7 (No. 07-1239).

⁴³⁹ *Winter*, 555 U.S. at 50 (Ginsburg, J., dissenting).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 48. See, e.g., 42 U.S.C. § 10141(c) (2006 & Supp. IV 2010) (exempting the EPA from preparing an EIS for the development of criteria for handling spent nuclear fuel and high-level radioactive waste); 43 U.S.C. § 1652(d) (2006 & Supp. IV 2010) (exempting construction of the trans-Alaska oil pipeline from further NEPA compliance); Floyd D. Spence National Defense

report to an office in the White House—is surely not what Congress had in mind when it instructed agencies to comply with NEPA ‘to the fullest extent possible.’”⁴⁴²

While the dissent makes an impassioned argument that the Navy had illegally by-passed NEPA, it ignored the facts that the Navy prepared an EA before the exercises, consulted with other agencies, and submitted the EA to the public. Not every federal action requires an EIS, and by going the EA route, the Navy did not contravene the “informational and participatory purpose” behind NEPA.⁴⁴³

D. Present Status of MFA

MFA sonar use by the Navy is not going away, but it will likely be challenged at every turn. Several key federal lawmakers have recently called on NOAA to strengthen the mitigation measures that the Navy must comply with when using MFA.⁴⁴⁴ This plea was made as NOAA was completing a review of the mitigation measures that the Navy employs.⁴⁴⁵ “The review, while focused on East Coast and Gulf of Mexico sonar activities, is considered by environmentalists to be precedent-setting for how sonar will be addressed at the various ranges off other coasts as well. ‘I think it’s a watershed’ for the sonar issue, one environmentalist says.”⁴⁴⁶ Earlier in 2009, the CEQ asked NOAA to reexamine the mitigation measures for the Navy’s Atlantic Fleet Active Sonar Training (AFAST) area—the largest of a series of training ranges for which the Navy has asked for take authorizations related to sonar use.⁴⁴⁷

In August 2009, the Navy issued its Record of Decision for the construction of an undersea warfare training range (USWTR)—a 500-square nautical mile shallow-water range off the coast of Florida—used for anti-submarine warfare training.⁴⁴⁸ Concerns about the use of MFA sonar and its

⁴⁴² Authorization Act for Fiscal Year 2001, Pub. L. 106-398, § 317, 114 Stat. 1654a-57 (exempting the military from preparing a programmatic EIS for low-level flight training).

⁴⁴³ *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

⁴⁴⁴ *Winter*, 555 U.S. at 48.

⁴⁴⁵ *Senators Pressure NOAA to Tighten Mitigation on Navy Sonar*, DEF. ENV’T ALERT, Aug. 4, 2009 [Senators Pressure NOAA], available at https://www.lexis.com/research/retrieve?_m=09698f6bf8b242e0bc3415616424e988&csvc=bl&cfor=m=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAl&_md5=e28b8e622131072ac70fae5f2a9db70b.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* (citation omitted).

⁴⁴⁸ *Id.*

⁴⁴⁸ Notice of Record of Decision for Undersea Warfare Training Range, 74 Fed. Reg. 40,573 (Aug. 12, 2009); *Navy Announces Decision on Undersea Warfare Training Range*, NAVY.MIL (Aug. 3, 2009, 2:48 PM), http://www.navy.mil/search/display.asp?story_id=47380.

impact on marine wildlife have been publicly raised by environmental groups.⁴⁴⁹ Since the publication of the Record of Decision, environmental groups are reported to be contemplating litigation.⁴⁵⁰ “Environmentalists say the Navy’s final environmental impact statement on the development fails to adequately address environmental impacts, particularly to the [North Atlantic] right whale.”⁴⁵¹ Even the EPA has expressed concern about marine impacts in the construction and operation of USWTR.⁴⁵²

Perhaps the next area of environmentalist focus will be the Gulf of Mexico (GOMEX) Range Complex. The GOMEX Range Complex is a combination of both sea and airspace where the Navy and the Marine Corps conduct training, including use of MFA sonar.⁴⁵³ The Navy is currently preparing an EIS.⁴⁵⁴

V. Factors Impacting the Potential Success of the Emergency Exception

Critics argue that the CEQ is not authorized to create a NEPA exception; only Congress has that power.⁴⁵⁵ They point to the fact that when Congress has seen an emergency, it has acted to create specific agencies.⁴⁵⁶ Courts then have excused these agencies from complying with NEPA because of Congress’ determination of the exigent circumstances of the emergency.⁴⁵⁷ The inference is that when Congress intends an emergency exception from NEPA, it will affirmatively create one.⁴⁵⁸

While an agency’s interpretation of its regulations is ordinarily entitled to substantial deference by reviewing courts,⁴⁵⁹ “where an agency’s interpretation defies the plain meaning of a regulation, courts have rejected the

⁴⁴⁹ *Navy Sonar at Whale Birthing Area Worries Some*, MSNBC.COM (Mar. 13, 2009, 12:47:17 PM ET), <http://www.msnbc.msn.com/id/29678135/>.

⁴⁵⁰ *Senators Pressure NOAA*, *supra* note 444.

⁴⁵¹ *Id.*

⁴⁵² Hind Sabir, *EPA Expresses Concern About Motorized Travel, Undersea Warfare Training*, TARGETED NEWS SERV., Aug. 7, 2009, available at TNS hs62 090807-996800.

⁴⁵³ U.S. Navy, *Range Sustainability*, GULF MEX. RANGE COMPLEX ENVTL. IMPACT STATEMENT, <http://www.gomexrangecomplexeis.com/RangeSustainability.aspx> (last visited Mar. 22, 2012).

⁴⁵⁴ U.S. Navy, *EIS/OEIS*, GULF MEX. RANGE COMPLEX ENVTL. IMPACT STATEMENT, <http://www.gomexrangecomplexeis.com/EIS.aspx#background> (last visited Mar. 22, 2012).

⁴⁵⁵ See, e.g., Orsi, *supra* note 42, at 499–502.

⁴⁵⁶ *Id.* at 494–95. See discussion *supra* Part II.E.1.a.

⁴⁵⁷ Orsi, *supra* note 42, at 496.

⁴⁵⁸ *Id.* See, e.g., *Cohen v. Price Commission*, 337 F. Supp. 1236 (S.D.N.Y. 1972).

⁴⁵⁹ See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309–10 (1974).

agency's interpretation.⁴⁶⁰ Until the *Winter v. NRDC* case, that had not happened in the context of the emergency exemption.⁴⁶¹

The critics of the emergency exception point out three major concerns: the CEQ exceeded the scope of authority granted to it by Executive Order No. 11,991, so 40 C.F.R. § 1506.11 is *ultra vires*; the lack of a definition of the term "emergency" may lead to more expansive interpretations; and courts may grant more deference to the CEQ's determinations than they are due.⁴⁶² Although all three arguments have at least some merit, only the second criticism will be explored more fully below. Of note is the fact that only the *ultra vires* argument was raised by the respondents in *Winter v. NRDC*.⁴⁶³

A. Lack of a Bright-Line Test

In the law, nothing is better than a bright-line test. "Bright line distinction" is "a test where the result is objectively, rather than subjectively, determined; an effort by an appellate court to provide clear guidance to lower courts in resolving an issue by making the presence or absence of a particular factor or factors determinative of the outcome."⁴⁶⁴ Neither 40 C.F.R. § 1506.11 nor case law articulates a bright-line test for determining the applicability of the emergency exception to NEPA. The Supreme Court in *Winter v. NRDC* had the opportunity to speak to this issue, yet chose not to, deciding the case instead on the issue of whether the injunction has been appropriately granted.⁴⁶⁵ In the context of military action, though, the District Court for the District of Massachusetts felt that the decision to call the early 1990s crisis in the Middle East an emergency, even after the Gulf War had ended, was not arbitrary and capricious.⁴⁶⁶ The current world situation is not much different, and perhaps even more dangerous, with new enemies cropping up. As such, the military's need to train is a given, and the prevention of such training is certainly an emergency.

⁴⁶⁰ See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

⁴⁶¹ ALEXANDER, *supra* note 5, at 10.

⁴⁶² Orsi, *supra* note 42, at 499–510.

⁴⁶³ Brief for the Petitioners, *Winter v. NRDC*, 555 U.S. 7 (2008) (No. 07-1239).

⁴⁶⁴ LAW DICTIONARY (Anderson Publ'g Co. 7th ed. 1997).

⁴⁶⁵ *Winter v. NRDC*, 555 U.S. 7 (2008), remanded to 560 F.3d 1027 (9th Cir. 2009) (holding that the lower court had not properly balanced the interests of the parties when issuing the injunction).

⁴⁶⁶ *Valley Citizens for a Safe Env't v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863 (D. Mass. May 6, 1991). See discussion *supra* Part III.A.3.

B. Using Other Statutes

1. Definition of “Emergency” in the Environmental Arena

Because “emergency” is not defined in NEPA or CEQ regulations, it is illustrative to look at other environmental statutes to see how they handle emergency situations. Under the Federal Insecticide, Fungicide and Rodenticide Act, the EPA Administrator may, at his or her discretion, exempt any federal or state agency from compliance with FIFRA, if he or she determines that emergency conditions exist.⁴⁶⁷ The Act does not define “emergency” but does say that the Administrator shall consult with the Secretary of Commerce and the governor of the state concerned when determining whether emergency conditions exist.⁴⁶⁸ Furthermore, the regulations implementing FIFRA say that there are four types of authorized emergency exemptions: specific, quarantine, public health, and crisis.⁴⁶⁹ Crisis exemption is one that may be used in an emergency condition when the time from the discovery of the emergency to the time when the pesticide use is needed is not long enough to allow for the authorization of a specific, quarantine, or public health exemption.⁴⁷⁰

The Wilderness Act allows for road building in the wilderness, otherwise prohibited, during “personal health and safety emergencies.”⁴⁷¹ It appears to narrow “emergencies,” a proposition that is aided by a different provision that says that certain measures may be taken as may be necessary in the control of fire, insects, and diseases.⁴⁷²

The Robert T. Stafford Disaster Relief and Emergency Assistance Act provides a NEPA exemption for immediate response actions.⁴⁷³ For disasters and emergency relief actions abroad, Executive Order 12,114 allows for exemptions from environmental review requirements.⁴⁷⁴

The only federal environmental law that actually defines “emergency” is the Marine Protection Research and Sanctuaries Act, otherwise known as the Ocean Dumping Act, which allows for dumping of industrial waste in emergencies⁴⁷⁵ and permits vessels to scuttle cargo and waste during

⁴⁶⁷ 7 U.S.C. § 136p (2006 & Supp. IV 2010).

⁴⁶⁸ *Id.*

⁴⁶⁹ 40 C.F.R. § 166.2 (2011).

⁴⁷⁰ *Id.*

⁴⁷¹ 16 U.S.C. § 1133(c) (2006 & Supp. IV 2010).

⁴⁷² 16 U.S.C. § 1133(d)(1) (2006 & Supp. IV 2010).

⁴⁷³ 42 U.S.C. § 5159 (2006 & Supp. IV 2010).

⁴⁷⁴ Exec. Order 12,114, § 2-5, 44 Fed. Reg. 1957 (Jan. 4, 1979).

⁴⁷⁵ 33 U.S.C. § 1412a (2006 & Supp. IV 2010).

emergencies.⁴⁷⁶ Section 1412a states: “As used herein, ‘emergency’ refers to situations requiring actions with a marked degree of urgency.”⁴⁷⁷ This definition was proposed by the Navy in *Winter v. NRDC*, though the Navy did not cite the Ocean Dumping Act.⁴⁷⁸

2. “Emergency” vs. National Security Interests

While some environmental laws have emergency exceptions, a far greater number have national security exceptions. It can be argued that national security interests are a particular type of emergency, and of course, not every emergency is a national security interest. But is every national security situation an emergency?

Conflicts certainly exist between the requirements of environmental laws and the protection of national security, although there are some who believe that such conflicts are avoidable with proper planning and foresight.⁴⁷⁹ The military understands this conflict only too well. As Rear Admiral (Upper Half) (RADM) Robert T. Moeller, Deputy Chief of Staff, Operations, Plans and Policy, U.S. Pacific Fleet, stated in 2003:

We face numerous challenges and adversaries that threaten our way of life. The President has directed us to ‘be ready’ to face this challenge. To fulfill this directive, we must conduct comprehensive and realistic combat training—providing our sailors with the experience and proficiency to carry out their missions. This requires appropriate use of our training ranges and operating area and testing weapon systems. The Navy has demonstrated stewardship of our natural resources. We will continue to promote the health of lands entrusted to our care. We recognize the responsibility to the nation in both these areas and seek your assistance in balancing these two requirements.⁴⁸⁰

Although NEPA does not have a specific national security exemption from its requirement to prepare an environmental review of major federal

⁴⁷⁶ 40 C.F.R. pt. 220 (2011).

⁴⁷⁷ 33 U.S.C. § 1412a(a).

⁴⁷⁸ Brief for the Petitioners, *Winter v. NRDC*, 555 U.S. 7 (2008) (No. 07-1239).

⁴⁷⁹ STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 185 (1996) (declaring that “with rare exceptions, we can maintain a strong effective defense without endangering the public health or destroying our national resources”); Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVT. L.J. 105, 108 (2007).

⁴⁸⁰ *National Security Readiness Act: Hearing on H.R. 1835 Before the H. Comm. on Resources*, 108th Cong. 21 (2003) (statement of RADM Robert T. Moeller).

actions significantly affecting the environment, the Act does contain language that could be viewed as allowing federal agencies sufficient flexibility to prevent it from being a showstopper to national security goals.⁴⁸¹ As an example, 42 U.S.C. § 4331(b) provides that the Government shall “use all practicable means, consistent with other essential considerations of national policy” and § 4332 only requires that a federal agency conduct environmental reviews “to the fullest extent possible.”⁴⁸² Courts have generally been protective of the military when faced with a conflict between NEPA mandates and military needs.⁴⁸³ However, critics are quick to point out that “[t]o the military, training and operations are on-going needs—not an emergency exception.”⁴⁸⁴ This argument certainly cuts against the Navy’s position in *Winter v. NRDC*.

Other environmental statutes have specific exemptions for military action, and the lack of one in NEPA could be interpreted to mean that Congress intended the military to comply fully with NEPA under all circumstances. Conversely, the fact that Congress has seen forty-one instances of the CEQ granting alternative arrangements under the emergency exception, nine of which have gone to the DOD,⁴⁸⁵ and not taken legislative action⁴⁸⁶ could mean that Congress acquiesces.

The exemptions to federal environmental laws that Congress has granted provide authority for suspending compliance requirements for actions at federal facilities on a case-by-case basis.⁴⁸⁷ Some are specific to military installations rather than all federal facilities.⁴⁸⁸ Most of the exemptions can only be granted by the President and not the head of the agency or department.⁴⁸⁹ Most are for activities that are in the “paramount interest of the United States” and some are specific to national security or national defense.⁴⁹⁰ Of note, none of the exemptions contain criteria for determining whether an activity meets the

⁴⁸¹ Babcock, *supra* note 479, at 115.

⁴⁸² *Id.* See also Willard et al., *supra* note 120, at 81.

⁴⁸³ *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981) (refusing to require the Navy to prepare a hypothetical EIS before completing facilities capable of storing nuclear weapons, saying that an EIS would not be required unless the Navy actually stored the nuclear weapons at the facilities, even though the Navy, for national security reasons, could neither admit or deny that it proposed to store nuclear weapons there); Babcock, *supra* note 479, at 115.

⁴⁸⁴ Willard et al., *supra* note 120, at 87

⁴⁸⁵ See *supra* notes 120–125 and accompanying text.

⁴⁸⁶ See discussion *supra* Part II.E.

⁴⁸⁷ BEARDEN, *supra* note 157, at CRS-1 to CRS-2.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

applicable threshold.⁴⁹¹ The President or other authorized decision-maker has the discretion to make this determination, depending on the statute.⁴⁹²

The DOD's position is that obtaining exemptions on a case-by-case basis is onerous due to the large number of training exercises routinely conducted on hundreds of military installations.⁴⁹³ A separate argument is that the time limits placed on most exemptions, which generally are one or two years, are incompatible with ongoing or recurring training activities.⁴⁹⁴

Under the MMPA, maritime military actions may be exempted if the Secretary of Defense, after conferring with the Secretary of Commerce, determines that the action is necessary for national defense.⁴⁹⁵ The exemption is good for up to two years, and additional exemption periods are allowed.⁴⁹⁶ The MMPA contains other accommodations for military actions. For example, it has a different definition of "harassment" when the action is part of military readiness activities, which effectively means that more harm is required before the action rises to the level of statutory harassment.⁴⁹⁷ Finally, under the MMPA's DOD "incidental take permits" provisions, the factors considered in determining the "least practical adverse impact" include personnel safety,⁴⁹⁸ practicality of implementation, and impact on the effectiveness of the activity.

While not particular to the military, CZMA has an exemption for compliance with a state Coastal Management Program if the action is in the paramount interest of the United States.⁴⁹⁹ However, this determination must be made by the President, not the head of the federal agency, and is not available until after a court has ruled against the agency.⁵⁰⁰

The President, if he finds that it is necessary in the interest of national defense or security, can waive compliance with the Toxic Substance Control Act,⁵⁰¹ CERCLA,⁵⁰² and the Emergency Planning and Community Right-to-

⁴⁹¹ *Id.* at CRS-2.

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* (stating that most time periods can be renewed).

⁴⁹⁵ 16 U.S.C. § 1371(f) (2006 & Supp. IV 2010).

⁴⁹⁶ *Id.*

⁴⁹⁷ 16 U.S.C. § 1362(18) (2006 & Supp. IV 2010).

⁴⁹⁸ 16 U.S.C. § 1371(a)(5)(A)(ii) (2006 & Supp. IV 2010).

⁴⁹⁹ 16 U.S.C. § 1456(c) (2006 & Supp. IV 2010).

⁵⁰⁰ *Id.* § 1456(c)(1)(B).

⁵⁰¹ 15 U.S.C. § 2621 (2006 & Supp. IV 2010) ("The Administrator shall waive compliance with any provision in this chapter upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.")

⁵⁰² 42 U.S.C. § 9620(j) (2006 & Supp. IV 2010) ("The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of

Know Act.⁵⁰³ The Noise Control Act allows exemptions for reasons of national security.⁵⁰⁴ The ESA states that the Committee shall grant an exemption from prohibited takes for any agency action, if the Secretary of Defense finds it necessary for reasons of national security.⁵⁰⁵ Provisions in the CAA allow for exemptions in the interest of national security⁵⁰⁶ or in the paramount interest of the United States.⁵⁰⁷ The President can grant relief to federal agencies from the requirements of the Safe Drinking Water Act when it would be in the paramount interest of national defense.⁵⁰⁸ Under the Resource Conservation and Recovery Act, the President can determine it to be in the paramount interest of the country to exempt any federal solid waste management facility⁵⁰⁹ or underground storage tanks from compliance.⁵¹⁰

The CWA has act of God and act of war exemptions⁵¹¹ and defines “act of God” as meaning an act “occasioned by an unanticipated grave natural disaster.”⁵¹² Similarly, CERCLA⁵¹³ and the Oil Pollution Act have “act of God”

Defense as may be necessary to protection the national security interests of the United States at that site or facility.”).

⁵⁰³ 42 U.S.C. §§ 11,001–11,050 (2006 & Supp. IV 2010); Exec. Order No. 13,148, 65 Fed. Reg 24,595 (April 26, 2000) (“Subject to Subsection 902(c) of this order and except as otherwise required by applicable law, in the interest of national security, the head of an agency may request from the President an exemption from complying with the provisions of any or all provisions of this order for particular agency facilities . . .”).

⁵⁰⁴ 42 U.S.C. § 4909(b)(1) (2006 & Supp. IV 2010).

⁵⁰⁵ 16 U.S.C. § 1536(j) (2006 & Supp. IV 2010). The ESA also contains a provision allowing for exemptions in presidentially declared disaster areas. 16 U.S.C. § 1536(p) (2006 & Supp. IV 2010).

⁵⁰⁶ 42 U.S.C. § 7412(i)(4) (2006 & Supp. IV 2010) (“The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than two years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so.”).

⁵⁰⁷ 42 U.S.C. § 7418(b) (2006 & Supp. IV 2010) (“The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . In addition to any such exemption . . ., the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance . . . any weaponry, equipment, aircraft, vehicles or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including Coast Guard) or by the National Guard of any state and which are uniquely military in nature.”).

⁵⁰⁸ 42 U.S.C. § 300h-7(h) (2006 & Supp. IV 2010).

⁵⁰⁹ 42 U.S.C. § 6961(a) (2006 & Supp. IV 2010).

⁵¹⁰ 42 U.S.C. § 6991f(a) (2006 & Supp. IV 2010). Similar provisions apply to treatment, storage and disposal facilities. 40 C.F.R. § 264.1(g)(8) (2011).

⁵¹¹ 33 U.S.C. § 1321(f) (2006 & Supp. IV 2010).

⁵¹² 33 U.S.C. § 1321(a)(12) (2006 & Supp. IV 2010).

⁵¹³ 42 U.S.C. § 9607(b)(1) (2006 & Supp. IV 2010).

and “act of war” defenses.⁵¹⁴ The National Historic Protection Act allows for disaster and national security threat waivers.⁵¹⁵

Executive Order 12,114, Environmental Effects Abroad of Major Federal Actions, contains a disaster exemption and an exemption for “actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict.”⁵¹⁶

The APA has a semblance of a national security exemption.⁵¹⁷ It excludes from the definition of “agency” any “military authority exercised in the field in the time of war or in occupied territory.”⁵¹⁸ However, courts have narrowly interpreted this provision.⁵¹⁹ For example, courts have expressed a reluctance to interfere with command relationships⁵²⁰ or second guess decisions on military training and equipping.⁵²¹ On the other hand, the military has not been given much deference in its application of other statutory schemes.⁵²²

VI. Conclusion

The fight over the Navy’s use of sonar and its potential affect on marine mammals is certainly not over. The Navy—and each of the military departments—follows the requirements of NEPA and CEQ regulations to the best of its ability the vast majority of the time. It does not make decisions about the environmental impacts of its actions, be they training or the movement of an aircraft carrier to a new homeport,⁵²³ in a vacuum. Agencies such as the EPA, the FWS, NOAA, and the National Marine Fisheries Service are all consulted, and they weigh in on the impacts. Yet, the military faces opposition and the threat of lawsuits and injunctions at every turn.

⁵¹⁴ 33 U.S.C. § 2703(a) (2006 & Supp. IV 2010).

⁵¹⁵ 16 U.S.C. § 470h-2(j) (2006 & Supp. IV 2010) (“The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to national security.”).

⁵¹⁶ Exec. Order No. 12,114, § 2-5(iii), 44 Fed. Reg. 1957 (Jan. 4, 1979).

⁵¹⁷ Willard et al., *supra* note 120, at 80.

⁵¹⁸ 5 U.S.C. § 701(b)(1)(G) (2006 & Supp. IV 2010); Willard et al., *supra* note 120, at 80.

⁵¹⁹ Willard et al., *supra* note 120, at 80.

⁵²⁰ Chappell v. Wallace, 462 U.S. 296 (1983); Willard et al., *supra* note 120, at 80.

⁵²¹ Gilligan v. Morgan, 413 U.S. 1 (1973); Willard et al., *supra* note 120, at 80.

⁵²² Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991) (holding that the plaintiff’s challenge to a Health and Human Services rulemaking allowing military to use unapproved, investigational drugs was outside the military authority exception); Willard et al., *supra* note 120, at 80.

⁵²³ Record of Decision for Facilities Development Necessary to Support the Homeporting of a Nimitz-Class Aircraft Carrier at the Naval Station, Mayport, Florida, 62 Fed. Reg. 44,954 (Aug. 25, 1997).

While the Navy did nothing wrong in the preparation of an EA during the events challenged in *Winter v. NRDC*, hopefully the lesson learned is to prepare an EIS far enough in advance to avoid the need to assert an emergency exception under 40 C.F.R. § 1506.11. The Navy should not pin its hopes on a court's interpretation of "emergency," even though some case law and other environmental statutes support the Navy's broad definition in *Winter v. NRDC*. Moreover, the arguments against the legality of 40 C.F.R. § 1506.11 have some merit; not only could a court decide that the situation does not merit an "emergency" status, but it could find the whole section unconstitutional.

A better state of affairs would be for NEPA to contain a national security exemption like those found in other environmental statutes. By locating the exemption in the statute, rather than in the CEQ regulations, this amendment would lend credibility to its legality and would show congressional intent. Furthermore, the new exemption should provide that only the President could exempt federal action, not the CEQ, the EPA, the Secretary of Defense, or the service secretaries. This would enhance uniformity and act as a check on military discretion.

"Train as we fight" is not just a phrase in the Navy and other services; it is a statement of the absolute necessity for realistic training and for preparing service members for the conditions in which they may find themselves. It is training to prepare for the national defense of us all.

DOES AFRICOM NEED ADDITIONAL FISCAL AUTHORITIES TO ACCOMPLISH ITS MISSION SET? THE FISCAL IMPLICATIONS OF AFRICOM'S INTERAGENCY CONSTRUCT

MAJOR MAXWELL S. SMART, USAF*

The United States now recognizes that the security sectors of at-risk countries are really systems of systems tying together the military, the police, the justice system, and other governance and oversight mechanisms. As such, building a partner's overall governance and security capacity is a shared responsibility across multiple agencies and departments of the U.S. national security apparatus—and one that requires flexible, responsive tools that provide incentives for cooperation.¹

I. Introduction

The continent of Africa has been a crossroads for both conflict and cooperation between the world's great powers for centuries. This is reflected in the political geography of the continent itself—the result of European colonization from the 1600s through the middle part of the twentieth century.² Indeed, the continent of Africa is a mosaic of cross cultural and international rivalry crafted over a millennium. The reality of Africa as a forum for

* Major Smart is a Judge Advocate in the U.S. Air Force, presently assigned as U.S. Air Force Exchange Officer, Directorate of Legal Services, Royal Air Force, United Kingdom. He earned the master of laws degree from The Judge Advocate General's Legal Center and School in 2010; the master of sciences degree from Troy University in 2009; the doctor of jurisprudence degree from Mercer University School of Law in 2003; and the bachelor of arts degree from the University of Georgia in 2000. He is a member of the State Bar of Georgia. This paper was submitted in partial completion of the master of laws degree requirements of the 58th Judge Advocate Officer Graduate Course. The views expressed herein are solely those of the author and do not reflect the official positions of the Department of Defense or the Department of the Air Force.

¹ Robert M. Gates, *Helping Others Defend Themselves: The Future of U.S. Security Assistance*, FOREIGN AFF., May/June 2010, at 2.

² HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY: TOWARD A DIPLOMACY FOR THE 21ST CENTURY 202–03 (2001) (stating borders in Africa “follow the demarcations between the spheres of influence of the European powers . . . [and] the administrative borders in each colony were drawn without regard to ethnic or tribal identities”).

international contention is not an accident of history. The continued and varied trade interests of the world's nations that exist on the continent demonstrate Africa's continued strategic importance to global prosperity and security. But abundant security challenges—famine, terrorism, great power competition, and internal strife, for example—threaten the stability of fragile national governments.³ In addition, increased activity in Africa by rising powers such as China make the continent a zone of potential conflict, as foreign countries vie for increased control over the shrinking supply of natural resources.⁴ Therefore, it should have come as little surprise when the United States announced in 2007 the formation of a new unified combatant command, U.S. African Command⁵ (AFRICOM), whose sole area of responsibility would be the African continent.⁶

The establishment of AFRICOM occurred without the creation of specially tailored fiscal authorities to accomplish its mission, as has become common for U.S. Central Command (CENTCOM) in Iraq and Afghanistan. Instead, AFRICOM receives its funding from preexisting general funding authorities, such as *United States Code* title 10 assistance authorities and other special authorities that are not necessarily tailored for the African continent or the command.⁶ Predictably, this has led some critics to argue current funding authorities are inadequate to fund AFRICOM's extensive scope of operations and additional fiscal resources are needed.⁷

This paper will argue that AFRICOM does not need additional fiscal authorities. Due to the unique structure of AFRICOM, it is positioned to accomplish its mission in a more efficient manner than other combatant commands through the use of current Department of Defense (DoD) fiscal authorities and interagency resources. To demonstrate the unique efficiencies and leveraging capacities present in AFRICOM, this article will first explore the general fiscal framework applicable to U.S. Government agencies and their operations. It will also provide background on AFRICOM's conception, doctrinal foundations, and command structure to demonstrate its unique qualities as a combatant command. Second, this article will discuss the general fiscal authorities, from both the Department of State and the DoD, available for use by

³ *Id.* at 201–10.

⁴ See Jennifer L. Parenti, *China-Africa Relations in the 21st Century*, JOINT FORCES Q., Jan. 2009, at 118, 118–24.

⁵ Fact Sheet: *United States Africa Command*, U.S. AFR. COMMAND (Aug. 1, 2011), <http://www.africom.mil/getArticle.asp?art=1644> [hereinafter Fact Sheet].

⁶ See, e.g., *Department of Defense Authorization for Appropriations for Fiscal Year 2010: Hearings on S. 1390 Before the S. Comm. on Armed Servs.*, 111th Cong. 31–47 (2010) [hereinafter Authorizations] (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command) (describing some of the various funding mechanisms utilized by AFRICOM).

⁷ See Jeffrey S. Palmer, *Legal Impediments to USAFRICOM Operationalization*, JOINT FORCES Q., Oct. 2008, at 79, 83–84.

AFRICOM, with an emphasis on the fiscal authorities most frequently relied upon by the command in the performance of its mission. This section will also address the fiscal challenges facing the command, such as infrastructure costs, lack of fiscal parity with civilian partners, and the limited nature of the fiscal authorities currently utilized. Finally, the article will demonstrate that further fiscal authorities beyond those currently available to AFRICOM are redundant and unnecessary.

II. U.S. Government Fiscal Law Framework

The purpose statute,⁸ the Foreign Assistance Act of 1961,⁹ and The Honorable Bill Alexander Opinion¹⁰ set the general fiscal framework within which the DoD and AFRICOM must operate when providing training and assistance or humanitarian assistance to foreign nations. Generally, the power to appropriate and set limitations on Federal Government spending rests with Congress.¹¹ This power stems from Article I, Section 9 of the Constitution, which states: “[N]o Money may be drawn from the Treasury, but in consequence of Appropriations made by Law.”¹² Through this “power of the purse,” Congress regulates and maintains the various departments and agencies of the Federal Government.¹³ This allows Congress to influence and enforce its wishes through fiscal allocations or withholdings in furtherance of congressional policy objectives. It also serves as a powerful check on the ambitions and activities of the other branches of the Federal Government.¹⁴

Congress’ power to regulate its appropriations is exercised through statutes as well. For an expenditure to be available and proper in fiscal law, the purpose of the expenditure must be authorized, the expenditure must occur within the time limits imposed by its authority, and the expenditure must be within the amount authorized. The combination of these three factors creates a legal expenditure.¹⁵

The purpose statute states that “appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”¹⁶ While the statute appears rigid in its application, it does not

⁸ 31 U.S.C. § 1301(a) (2006 & Supp. IV 2010).

⁹ 22 U.S.C. §§ 2151–2431 (2006 & Supp. IV 2010).

¹⁰ Hon. Bill Alexander, 63 Comp. Gen. 422, 427–28 (1984).

¹¹ 1 U.S. GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 1-3 (3rd ed. 2004) [hereinafter GAO REDBOOK].

¹² U.S. CONST. art. I, § 9.

¹³ 1 GAO REDBOOK, *supra* note 11, at 1-3.

¹⁴ *Id.* at 1-5.

¹⁵ *Id.* at 4-6.

¹⁶ 31 U.S.C. § 1301(a) (2006 & Supp. IV 2010).

require that every item purchased under the authority be specifically listed in the statute. The expenditure must simply be reasonably related to carrying out the purpose articulated in the authorizing statute.¹⁷ Further elaborating on the purpose statute, the Government Accountability Office (GAO), charged with oversight of government expenditures, developed the Necessary Expense Doctrine.¹⁸ The GAO Necessary Expense Doctrine determines whether an expenditure is for a proper and reasonable purpose. The Necessary Expense Doctrine requires that:

- (1) The expenditure bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.
- (2) The expenditure must not be prohibited by law.
- (3) The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.¹⁹

In addition to the general fiscal principles described above, Congress also has provided statutory guidance in the area of foreign assistance. The Foreign Assistance Act of 1961 provides a statutory framework for the provision of aid to foreign governments in the fields of security and development assistance.²⁰ Originally enacted to assist nations in their fight against Communism during the Cold War, the Foreign Assistance Act today serves as legal authority for all foreign assistance provided by the U.S. Government.²¹ Under 22 U.S.C. § 2151, the Department of State is the statutory lead federal agency for the coordination and implementation of U.S. Government foreign development activities.²² These responsibilities include the formulation of policy guidance and oversight authority of U.S. Government foreign assistance programs.²³ In addition to its general provisions, the overall Foreign Assistance Act consists of two general parts: one for providing civilian foreign assistance to developing nations and another providing for military assistance and weapons

¹⁷ 1 GAO REDBOOK, *supra* note 11, at 4-20.

¹⁸ See Hon. Bill Alexander, *supra* note 10, at 427–28; Hon. Robert W. Kastenmeier, B-230304, 1988 U.S. Comp. Gen. LEXIS 1592 (Comp. Gen. Mar. 18, 1988).

¹⁹ 1 GAO REDBOOK, *supra* note 11, at 4-21 to -22.

²⁰ 22 U.S.C. §§ 2151–2431 (2006 & Supp. IV 2010).

²¹ 22 U.S.C. § 2151.

²² 22 U.S.C. § 2151(a).

²³ 22 U.S.C. § 2151(b).

sales.²⁴ While the State Department is statutorily the leader for conducting foreign policy and assistance, Congress has granted the DoD limited authority to conduct basic foreign assistance training in the course of funding U.S. military operations.²⁵ This delineation was further elaborated in The Honorable Bill Alexander Opinion.

The DoD's role in foreign assistance was the subject of the pivotal GAO decision, The Honorable Bill Alexander Opinion, in 1984.²⁶ The opinion arose from a request by former U.S. Representative Bill Alexander for the GAO to determine whether the DoD properly used Operations and Maintenance (O&M) funds to finance extensive joint exercises with the Honduran military.²⁷ The exercise began on 3 August 1983 and lasted until 8 February 1984.²⁸ In that six month span, over 12,000 American troops assisted in the construction or expansion of three airfields over 3,000 feet in length, constructed 300 huts that served as support infrastructure to the Hondurans, set up two operational radar systems, and provided massive amounts of training in various combat and support specialties to hundreds of Honduran military personnel.²⁹ In addition, various amounts of humanitarian projects were conducted, including veterinary services to tens of thousands of animals and building a school.³⁰ All of the projects were paid with O&M funding.³¹

The GAO fully analyzed the fiscal implications surrounding the construction activities, radar facility operations, training, and civic or humanitarian assistance activities in its opinion.³² In regards to the training conducted by the military, the DoD initially maintained that the training was not for the benefit of the Honduran military but was to ensure familiarity and interoperability for purposes of the exercise.³³ However, the GAO found that the training involved more extensive activities than the DoD claimed.³⁴ For example, U.S. military personnel provided a five-week combat medic training class for 100 Honduran troops, a three to four week training program on 105mm artillery howitzer operations to two Honduran artillery battalions, as well as Special Forces training on mortars, fire direction tactics, and counterinsurgency

²⁴ See generally 22 U.S.C. §§ 2151–2431.

²⁵ See generally INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 268–84 (2008) [hereinafter JA 422].

²⁶ Hon. Bill Alexander, *supra* note 10.

²⁷ *Id.*

²⁸ *Id.* app. A, at 1 (all cited information comes from the unclassified version of the appendix).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* app. A, at 2.

³² *Id.* app. A, at 2–27.

³³ *Id.* app. A, at 18.

³⁴ *Id.* app. A, at 18–20.

tactics to four Honduran battalions.³⁵ The GAO found that when familiarization and safety training reaches the level of security assistance, it should be classified as security assistance and funded as such.³⁶ Although the training provided had collateral benefits to American military forces, this was not sufficient to change the security assistance nature of the activity.³⁷ Therefore, regarding the training provided, the GAO found the assistance rose to the level of security assistance, the use of O&M funding to finance such activities was in violation of 31 U.S.C. § 1301(a), and security assistance funding sources should have been utilized.³⁸

Regarding the humanitarian assistance provided by the DoD, the GAO found that extensive programs were in effect throughout the duration of the exercise.³⁹ The report detailed the following regarding these activities:

[They] occurred on an almost daily basis. According to the DoD, personnel . . . conducted [programs] throughout Honduras over the course of the exercises, resulting in the treatment of over 46,000 Honduran civilian medical patients, 7,000 dental patients, 100,000 immunizations, and the treatment, under a veterinary program, of over 37,000 animals.⁴⁰

In addition, a group of Navy Sailors from a construction battalion built a schoolhouse, and large amounts of medical supplies were distributed to several locations throughout the country.⁴¹ The DoD was not able to explain what authority it utilized to provide this aid when questioned by the GAO.⁴² The activities were funded with O&M, and no reimbursement was provided.⁴³ The GAO noted that the DoD has limited authority to provide incidental humanitarian assistance in the course of conducting security assistance programs at the behest of the Department of State.⁴⁴ This humanitarian assistance, however, must not be extensive or expensive.⁴⁵ In analyzing the Honduran exercise, the GAO determined that the assistance provided was of a type normally conducted through Department of State run development programs

³⁵ *Id.* app. A, at 19.

³⁶ *Id.* app. A, at 20.

³⁷ *Id.* app. A, at 21.

³⁸ *Id.* app. A, at 22.

³⁹ *Id.* app. A, at 23.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* app. A, at 23–26.

under the Foreign Assistance Act.⁴⁶ The GAO again found that the DoD's use of O&M funds violated 31 U.S.C. § 1301(a) and was improper.⁴⁷

The Honorable Bill Alexander Opinion reaffirms that the Department of State is the lead U.S. Government agency for foreign assistance to foreign nations. Further, the opinion makes clear that the DoD can provide limited training to foreign military forces when it is truly for the purposes of interoperability and familiarization. Humanitarian assistance by the DoD is permissible when incidental to its military mission.⁴⁸ The DoD may also conduct either security or humanitarian assistance when specifically authorized to do so. Absent these circumstances, the DoD is forbidden from funding or performing foreign assistance on its own.⁴⁹ The opinion, with its distinction between security assistance and humanitarian assistance activities, also provides a useful framework through which to analyze fiscal authorities. AFRICOM has stated its intent to accomplish its mission primarily through sustained security engagement and assistance.⁵⁰ This highlights the importance of understanding the basic fiscal framework discussed in this section in order to fully evaluate the utility of the fiscal resources currently available to the command.

III. AFRICOM

A. Background

The background of AFRICOM's establishment and interagency construct is an important prerequisite to understanding the command's unique ability to leverage interagency fiscal resources.

The establishment of a combatant command focusing exclusively on Africa occurred as a result of gradual escalation of U.S. priorities on the continent. Prior to the 1990s, Africa was accorded only nominal interest as a subset of U.S. European Command's (EUCOM) responsibilities.⁵¹ Many U.S. activities in the region over the following decades were in furtherance of Cold

⁴⁶ *Id.* app. A, at 26.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Major Timothy A. Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, 10 ARMY LAW., Oct. 2008, at 5, 5–6.

⁵⁰ AFRICOM: *Rationales, Roles, and Progress on the Eve of Operations: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 16–20 (2009) [hereinafter AFRICOM] (statement of Ambassador Mary Yates, Deputy to the Commander for Civil-Military Affairs, U.S. Africa Command).

⁵¹ See Nicolas van de Walle, *U.S. Policy Towards Africa: The Bush Legacy and the Obama Administration*, AFR. AFF., Jan. 2010, at 1, 1–21 (arguing Africa is “a region perceived to be of secondary importance”).

War era containment priorities, leading to a divide in responsibilities among European, Pacific, and Central Commands in 1983.⁵²

Following the Somalia humanitarian mission debacle in 1993, U.S. policy largely abandoned Africa as a concern. This point is highlighted in the 1995 DoD Security Strategy for Sub-Saharan Africa, which maintains that there was little of strategic interest to the United States in Africa absent humanitarian and political concerns.⁵³ The terrorist bombings in east Africa in 1998 and U.S. retaliation in the Sudan brought Africa back to the attention of U.S. foreign policymakers.⁵⁴ Following the attacks of 11 September 2001, Africa became prominent in U.S. national security interest considerations and was cited in the 2002 National Security Strategy⁵⁵ and the 2006 National Security Strategy as requiring more focused approaches and higher priority status.⁵⁶ DoD policy studies in 2004 cited five factors that have increased U.S. strategic interests in Africa, including HIV/AIDS, oil and global trade, maritime security, armed conflicts, and terrorism.⁵⁷ In September 2006, National Security Presidential Directive 50 (NSPD 50) established U.S. national security strategy for Africa.⁵⁸ The primary objectives, as interpreted by AFRICOM, are to “build capacity, consolidate democratic transitions, bolster fragile states, strengthen regional and sub-regional organizations, strengthen regional security, stimulate Africa’s

⁵² AFRICOM, *supra* note 50, at 2 (statement of Rep. John F. Tierney, Chairman of the House Committee on Oversight and Government Reform) (“AFRICOM will bring three existing military commands with responsibilities for parts of Africa into one Africa-centric command. AFRICOM’s geographic jurisdiction has been carved from CENTCOM, which focused on the Horn of Africa and other eastern regions of the continent; the U.S. Pacific Command, which focused on Madagascar; and the U.S.-European Command, EUCOM, which focused on Western and Southern Africa.”).

⁵³ OFFICE OF INTERNATIONAL SECURITY AFFAIRS, DEPARTMENT OF DEFENSE, U.S. SECURITY STRATEGY FOR SUB-SAHARAN AFRICA 3 (Aug. 1, 1995), available at <http://www.defense.gov/speeches/speech.aspx?speechid=943>.

⁵⁴ Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites In Afghanistan, Factory in Sudan*, WASH. POST, Aug. 21, 1998, at A1.

⁵⁵ WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 10–11 (2002).

⁵⁶ WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 37 (2006) (“Africa holds growing geo-strategic importance and is a high priority of this Administration.”).

⁵⁷ LAUREN PLOCH, CONG. RESEARCH SERV., RL34003, AFRICA COMMAND: U.S. STRATEGIC INTERESTS AND THE ROLE OF THE U.S. MILITARY IN AFRICA 15 (2011) (“In 2004 an advisory panel of Africa experts authorized by Congress to propose new policy initiatives identified five factors that have shaped increased U.S. interest in Africa in the past decade: oil, global trade, armed conflicts, terror, and HIV/AIDS.”).

⁵⁸ WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 50, U.S. STRATEGY FOR SUB-SAHARAN AFRICA (2007).

economic development and growth, and provide humanitarian and development assistance.”⁵⁹

The concept of regional stability based upon strengthening of domestic democratic principles, as reflected in the NSPD 50 goal of protecting democratic transitions, has its roots in the traditional liberal political view that democracies will not go to war with each other.⁶⁰ This view maintains that the spread of democracy will, in turn, lead to a reduction in the potential for war among nations.⁶¹ We must explore this theory briefly in order to grasp the broad political purpose that AFRICOM’s interagency construct is designed to accomplish by utilizing the fiscal authorities discussed later in the article.

While Immanuel Kant is attributed as the first to articulate the liberal peace theory, the origin of this theory in American policy circles can be found in the writings and orations of President Woodrow Wilson as he worked to craft the League of Nations during peace treaty discussions at Versailles following the First World War.⁶² Henry Kissinger cites Wilson’s presidency as the start of a shift in what until then had been a national foreign policy tradition dedicated to providing a democratic example to the world rather than exporting democracy around the world in a messianic fashion.⁶³ According to Kissinger, Wilson established three foundations of American foreign policy that persist in its actions today:

First, international order is rooted in principles of harmony, not war. Second, international transformations must be based on principles of law and consent, not force. Further, the ideal state is based on principles of democracy or is in fact democratic. Third, according to Wilson, democratic nations

⁵⁹ Theresa Whelan, Deputy Assistant Sec’y of Def. for Afr. Affairs, Office of the Sec’y of Def., Address at Royal United Services Institute (Feb. 18, 2008), <http://www.africom.mil/getArticle.asp?art=1663>.

⁶⁰ JOSEPH NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICTS: AN INTRODUCTION TO THEORY AND HISTORY 48–49 (6th ed. 2007); Michael W. Doyle, *Three Pillars of Liberal Peace*, 99 AM. POL. SCI. REV. 3 (2005) (describing “two important regularities in world politics—the tendencies of liberal states simultaneously to be peace-prone in their relations with each other and war-prone in their relations with nonliberal states”).

⁶¹ See Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946–1986*, 87 AM. POL. SCI. REV. 624, 626 (1993) (“[D]ue to the complexity of the democratic process and the requirement of securing a broad base of support for risky policies, democratic leaders are reluctant to wage wars, except in cases wherein war seems a necessity or when the aware aims are seen as justifying the mobilization costs.”).

⁶² CHARLES REYNOLDS, THEORY AND EXPLANATION IN INTERNATIONAL POLITICS 270–71 (1973).

⁶³ KISSINGER, *supra* note 2, at 244–45 (“Wilson’s innovation was to translate what had been heretofore conceived as a ‘shining city on the hill,’ inspiring others by moral example, into a crusade to spread these values by an active foreign policy.”).

represent the ultimate in altruistic political order, concerned not with conquest but the betterment of its citizenry and the spread of its universal benevolent values.⁶⁴

Wilson thus advocated “making the world safe for democracy”⁶⁵ and saw its spread as a necessary corollary to the elimination of war as a threat to international peace and security.⁶⁶ The Wilsonian ideal became entrenched in the political consciousness of American policymakers and can be seen in various manifestations in both Democratic and Republican administrations from Franklin Delano Roosevelt’s to the present.⁶⁷ Kissinger makes the point that the concept of spreading democracy around the world has served as the foundation for criticism of U.S. foreign policy as aggressive and imperialistic.⁶⁸ Still, that the Wilsonian ideal lives on in both conservative and liberal administrations in the United States speaks to how deeply rooted his views have become in the American political psyche.

This context is necessary to understand the doctrinal changes that emerged in the defense policy community prior to the creation of AFRICOM and its interagency structure. From a fiscal law perspective, it helps to show why AFRICOM can use its interagency structure to access interagency fiscal resources.

B. The Relationship of Doctrinal Developments to AFRICOM Funding

Doctrinal developments for the DoD as a result of military operations in the War on Terror have had enormous influence on the development of AFRICOM. The chaos and interagency deficiencies highlighted by the post-conflict reconstruction efforts in Afghanistan and Iraq led to a sweeping change in doctrine affecting interagency coordination and cooperation in the Federal Government, generally, and the DoD, in particular.⁶⁹ These changes were first discussed at a national level in the National Security Presidential Directive 44 (NSPD 44), which proclaimed its purpose as improving the coordination of U.S. Government agency efforts in the field of stabilization and reconstruction

⁶⁴ *Id.* at 244.

⁶⁵ Woodrow Wilson, U.S. President, Address to a Joint Session of Congress Requesting a Declaration of War Against Germany (Apr. 2, 1917), <http://www.presidency.ucsb.edu/ws/index.php?pid=65366#axzz1nKo1CZlr>.

⁶⁶ KISSINGER, *supra* note 2, at 243–44; see Wilson, *supra* note 65 (“A steadfast concert for peace can never be maintained except by a partnership of democratic nations. No autocratic government could be trusted to keep faith within it or observe its covenants.”).

⁶⁷ See KISSINGER, *supra* note 2, at 245–56 (surveying Wilsonian manifestations in Presidential administrations from Roosevelt to Clinton).

⁶⁸ *Id.* at 244.

⁶⁹ Furin, *supra* note 49, at 7.

assistance.⁷⁰ The directive declared it is U.S. policy to help prevent nation state failure and provide assistance to countries transitioning from conflict to peace and declared U.S. national efforts should be focused on facilitating the transition of strife torn countries toward democratic and free market principles as a corollary to achieving peace.⁷¹ The Department of State is empowered to coordinate and direct government efforts and directed to coordinate its efforts with those of the DoD.⁷²

At a departmental level, Department of Defense Instruction 3000.05, Stability Operations (DoDI 3000.05) serves as the implementing regulation for this area of military operations.⁷³ This instruction is significant in several ways. Its most significant impact is that it makes stability operations a core military competency equal in importance to combat operations.⁷⁴ In addition, the instruction mandates that stability operations be conducted at all phases of operations and that the DoD support the stability efforts of other government agencies.⁷⁵ In addition, integrated military and civilian efforts are deemed essential to mission success.⁷⁶ This cultural shift towards a comprehensive treatment of any respective security situation to put stability operations on par with combat operations is a radical change from previous DoD concepts that placed stability operations as solely a post conflict activity.⁷⁷ From a fiscal perspective, DoDI 3000.05 can lead to frustration, because it appears to represent an expansion of mission without a concurrent expansion of fiscal resources, indicating an assumption that current fiscal authorities and resources are sufficient for the DoD to execute this policy if managed efficiently.

⁷⁰ WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION 1 (Dec. 7, 2005) [hereinafter NSPD 44], available at <http://www.fas.org/irp/offdocs/nspd/nspd-44.pdf>.

⁷¹ *Id.* at 1–2.

⁷² *Id.* at 2 & 5; U.S. DEP'T OF THE ARMY, FIELD MANUAL 1-04: LEGAL SUPPORT TO THE OPERATIONAL ARMY app. D, at D-7 (2009) (“The Department of State is charged with leading and coordinating U.S. Government efforts to conduct reconstruction and stabilization operations. Nonetheless, in spite of the civilian lead, stability operations have been made a central part of the modern military's functional competence.”); see also Dan E. Stigall, *The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to Targeting Civilians*, 25 AM. U. INT'L L. REV. 885, 899 (2010) (“Military doctrine, as one might expect, conforms to NSPD 44 and reflects the primacy of civilian leadership in stability operations.”).

⁷³ U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS (16 Sept. 2009) [hereinafter DODI 3000.05].

⁷⁴ *Id.* para. 4(a).

⁷⁵ *Id.* para. 4(a)(1)–(2) (“Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.”).

⁷⁶ *Id.* para. 4(c).

⁷⁷ See Furin, *supra* note 49, at 10.

The doctrinal foundations discussed above form the base upon which AFRICOM was built. President George W. Bush announced the formation of the DoD's newest combatant command on 6 February 2007.⁷⁸ The creation of AFRICOM is based on a realization by American policymakers that the combination of social and political instability in Africa creates a fertile breeding ground for emerging threats to U.S. national security and foreign policy objectives.⁷⁹ In addition, the creation of AFRICOM is an acknowledgement that previous defense structure—dividing responsibility for the continent among three disparate commands—was inadequate.⁸⁰ The lack of clarity and precision regarding the division of responsibilities among these three combatant commands was a direct hindrance to DoD efforts to respond to crises as they developed on the continent.⁸¹ Thus, AFRICOM seeks to provide a “strategic, holistic DoD approach to security on the African continent . . . [through] strengthening . . . security cooperation efforts and bolstering the capabilities of . . . African partners.”⁸² AFRICOM sought to be a new kind of command that integrates other civilian governmental agencies into its command structure to ensure coordination at the planning and execution level of its mission.⁸³ The combatant command’s goals are ambitious and seek a new level of coordination and cooperation between the agencies of the government in pursuit of U.S. foreign policy interests. This doctrinal foundation provides the base from which

⁷⁸ Isaac Kfir, *The Challenge That is AFRICOM*, JOINT FORCES Q., Jan. 2008, at 110, 110.

⁷⁹ See Sean McFate, *U.S. Africa Command: Next Step or Next Stumble*, AFR. AFF., Jan. 2008, at 111, 115. “The purpose of the command is . . . what we refer to as anticipatory measures, and those are taking actions that will prevent problems from becoming crises, and crises from becoming conflicts. So the mission of the command is to be able to prevent that.” News Briefing by Christopher Ryan Henry, Principal Deputy Under Secretary of Def. for Policy, U.S. Dep’t of Def. (Apr. 23, 2007).

⁸⁰ Kfir, *supra* note 78, at 111; see also McFate, *supra* note 79, at 112 (“AFRICOM involves more than just redrawing maps inside the Pentagon and changing nameplates on office doors. AFRICOM is a response to the growing strategic importance of Africa within the US spectrum of vital interests.”).

⁸¹ Kfir, *supra* note 78, at 111–12; see also McFate, *supra* note 79, at 112 (“Splitting Africa’s responsibility caused “[a]n unfortunate consequence [that] was a potential for disunity in DoD efforts in Africa, especially at the ‘seams’ between Unified Commands. For instance, a hypothetical US military response to the crisis in Darfur might be hampered because the area of concern straddles the EUCOM and CENTCOM boundary, causing coordination challenges.”).

⁸² *Budget Request from the U.S. European Command, Southern Command, and Africa Command: Hearing on National Defense Authorization Act for Fiscal Year 2009 Before the H. Armed Servs. Comm.*, 110th Cong. (2009) [hereinafter *Budget Request*] (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

⁸³ *Id.* at 149 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command) (“AFRICOM’s efforts and presence on the continent will reflect coordination with the Department of State, the desires of our African partners, and consistency with U.S. foreign policy objectives.”).

AFRICOM contributes its part in interagency cooperative efforts in pursuit of U.S. foreign policy objectives.⁸⁴

C. AFRICOM Infrastructure

AFRICOM's infrastructure demonstrates it was optimized from its creation to operate in an interagency environment. AFRICOM's current mission statement declares it will, together with other U.S. Government agencies, "conduct sustained security engagement through military to military programs, military sponsored activities, and other military operations as directed to promote a stable and secure African environment in support of U.S. foreign policy."⁸⁵ As the mission statement suggests, AFRICOM seeks to promote itself as a new kind of combatant command built on principles of interagency cooperation and conflict prevention.

Theresa Whelan, Deputy Assistant Secretary of Defense for African Affairs, highlights four areas in which AFRICOM is an innovative command. First, AFRICOM is focused on fostering bilateral military ties and interactions with regional organizations to bolster regional security capacity.⁸⁶ Second, the command integrates State Department and U.S. Agency for International Development (USAID) personnel into its command structure to leverage preexisting institutional relationships with African entities.⁸⁷ Third, AFRICOM acts as a staff headquarters with no permanently apportioned forces and includes a State Department official as a civilian deputy on par with the military deputy to the Commander.⁸⁸ Fourth, AFRICOM focuses on conflict prevention through a policy of active and continuous engagement with African partners.⁸⁹ The unique characteristics of the command outlined above highlight the interagency funding potential for AFRICOM.⁹⁰

⁸⁴ See generally ROBERT G. BERSCHINSKI, STRATEGIC STUDIES INST., U.S. ARMY WAR COLL., AFRICOM'S DILEMMA: THE "GLOBAL WAR ON TERRORISM," "CAPACITY BUILDING," HUMANITARIANISM, AND THE FUTURE OF U.S. SECURITY POLICY IN AFRICA 6 (2007) ("DoD planners are organizing AFRICOM along highly nontraditional lines. . . . build[ing] both indigenous African security capacities and U.S. interagency collaboration, and . . . abandoning the 'J-code' warplanning organizational structure traditionally associated with combatant command . . . staffs."), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=827>.

⁸⁵ AFRICOM, *supra* note 50, at 7 (statement of Ambassador Mary Yates, Deputy to the Commander for Civil-Military Affairs, U.S. Africa Command).

⁸⁶ AFRICOM, *supra* note 50, at 13 (statement of Theresa Whelan, Deputy Assistant Secretary of Defense for African Affairs).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

AFRICOM expands on its general mission in its theater strategic objectives. These include defeating Al Qaeda, ensuring peace operation capacity and efficiency, cooperating with identified African states in countering the possession and proliferation of weapons of mass destruction (WMD) capabilities and expertise, fostering security sector governance and stability through support for civilian U.S. Government efforts in the region, and protecting populations from deadly contagions.⁹¹ These activities are based on an “active security” concept defined as “persistent and sustained level of effort oriented on security assistance programs that prevent conflict and foster continued dialogue and development.”⁹² Many of these implicate the use of security assistance or humanitarian assistance funding streams rather than O&M funds, a distinction articulated in The Honorable Bill Alexander Opinion,⁹³ and are the province of the Department of State, with the DoD playing a role when specifically authorized to do so or when such assistance is incidental to its military mission.⁹⁴ These objectives suggest a level of interagency cooperation that would seem to allow the command to leverage not only its own fiscal resources but also the resources of other agencies. This scenario would see the DoD acting as the agent of other arms of the U.S. Government, thereby accomplishing overall U.S. Government policies and objectives through execution of the security aspects of civilian agency programs.

In order to manage the substantial task assigned to it, AFRICOM adopts a three-pronged approach, with the command focused and playing a leading role in the security arena, while simultaneously playing a supporting role to civilian agencies in the diplomatic and development, or civilian capacity building, arenas.⁹⁵ According to Congressional Research Service’s Lauren Ploch, this has led some to refer to AFRICOM as a combatant command “plus” that operates as a unified command with a “soft power” focus, partnering with civilian agencies to shape a “stable security environment” in its area of responsibility.⁹⁶

The internal structure of the command reflects this characterization. AFRICOM’s command structure consists of a headquarters element supported

⁹¹ *Authorizations*, *supra* note 6, at 34 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

⁹² *Budget Request*, *supra* note 82, at 137 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

⁹³ Hon. Bill Alexander, *supra* note 10, at 427–28.

⁹⁴ 22 U.S.C. § 2151(a) (2006 & Supp. IV 2010); Furin, *supra* note 49, at 2; *see also* Hon. Bill Alexander, *supra* note 10, app. A.

⁹⁵ *Nominations Before the S. Armed Servs. Comm., 1st Session, 110th Cong.: Hearings Before the S. Armed Servs. Comm.*, 110th Cong. 1014 (2007) [hereinafter *Nominations*] (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

⁹⁶ PLOCH, *supra* note 57, at 8.

by component commands representing the various services. AFRICOM is headquartered at Kelley Barracks, Stuttgart, Germany and consists of a headquarters staff of 1,500 personnel.⁹⁷ AFRICOM's unique whole government approach had led to DoD claims that over twenty-five percent of the headquarters staff would consist of civilian agency personnel.⁹⁸ At present, while half of AFRICOM positions are civilian, only four percent are staffed by other civilian agency personnel.⁹⁹ AFRICOM envisions deepening the acquisition of other agency personnel at all levels of the headquarters staff as the command continues to develop.¹⁰⁰ Significantly, the combatant commander—a four-star position—has both a military and civilian deputy.¹⁰¹ The Deputy to the Commander for Military Operations—a three-star position—is the military deputy exercising combatant command authority when the Commander is not available and is responsible for command “operational implementation and execution.”¹⁰² The Deputy to the Commander for Civil-Military Activities—a three-star civilian equivalent position—is staffed by a senior Department of State official who does not exercise command authority but is instead responsible for harmonizing command activities with other civilian agencies, as well as “directing the command’s civil military planning and programs.”¹⁰³

Supporting the headquarters element described above are four component commands and one sub-unified command.¹⁰⁴ None of the component commands have permanently assigned forces. The land component command is U.S. Army Africa (USARAF), which carries out security engagement missions with African land forces in accordance with both DoD and State Department programs.¹⁰⁵ U.S. Naval Forces Africa (NAVAF) conducts maritime safety and security training missions with African partners as part of its role as AFRICOM’s maritime component command.¹⁰⁶ AFRICOM’s marine component command is U.S. Marine Corps Forces Africa (MARFORAF), which conducts training activities predominantly in West Africa and Guinea.¹⁰⁷ U.S. Air Forces Africa (AFAFRICA), which conducts predominantly

⁹⁷ *Fact Sheet*, *supra* note 5.

⁹⁸ PLOCH, *supra* note 57, at 7.

⁹⁹ *Fact Sheet*, *supra* note 5.

¹⁰⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-947T, FORCE STRUCTURE: PRELIMINARY OBSERVATIONS ON THE PROGRESS AND CHALLENGES ASSOCIATED WITH ESTABLISHING THE U.S. AFRICA COMMAND 12 (2008) [hereinafter GAO-08-947T].

¹⁰¹ *Nominations*, *supra* note 95, at 1012–13 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

¹⁰² *Id.* at 1013.

¹⁰³ *Id.*

¹⁰⁴ *Authorizations*, *supra* note 6, at 43 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 44.

humanitarian and disaster relief activities, represents the air component command.¹⁰⁸ U.S. Special Operations Command Africa (SOCOMAFRICA) operates as a sub-unified command and conducts civil affairs, information operations, and exchange training exercises.¹⁰⁹

The founding of AFRICOM created a firestorm of controversy that emanated from both foreign and domestic sources. The concerns were so prevalent that the operationalization of the command was impeded, prompting a GAO report on the matter.¹¹⁰ The GAO found that even though the founding of the command was accompanied with repeated assurances that DoD would support but not lead U.S. policy in Africa, systemic distrust of DoD motivations were widespread.¹¹¹ For example, Department of State officials were concerned that DoD might attempt to take the lead for U.S. Government activities in Africa, which could result in a gradual militarization of U.S. foreign policy in Africa.¹¹² In another example, nongovernmental organizations expressed concerns that their humanitarian aid efforts could become jeopardized if they were seen to be too closely aligned to DoD efforts on the continent.¹¹³ Further, the gross disparity in resources between DoD and nongovernmental aid organizations and civilian agencies of the U.S. Government could edge out non-DoD agencies from the foreign policy field.¹¹⁴

African countries also expressed concerns that AFRICOM did not necessarily share their security priorities, which centered on the availability of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 44.

¹¹⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-181, DEFENSE MANAGEMENT: ACTIONS NEEDED TO ADDRESS STAKEHOLDER CONCERNS, IMPROVE INTERAGENCY COLLABORATION, AND DETERMINE FULL COSTS ASSOCIATED WITH THE U.S. AFRICA COMMAND 2 (2009) [hereinafter GAO-09-181].

¹¹¹ *Id.* at 13–14; *see also* BERSCHINSKI, *supra* note 84, at vi (“Because of its pioneering incorporation of security, development, and humanitarian functions into one organization, AFRICOM may be particularly susceptible to criticism if its sporadic ‘hard’ operations overshadow its ‘softer’ initiatives.”); Salim Lone, Op-Ed., *The Last Thing We Need*, GUARDIAN (London), 11 Mar. 2007, at 33 (criticizing America’s reliance on the projection and use force of force to tackle what are deeply political and social issues).

¹¹² GAO-09-181, *supra* note 110, at 14 (“[S]ome State officials expressed concerns that AFRICOM would become the lead for U.S. government activities in Africa, even though U.S. embassies lead decision making on U.S. government non-combat activities conducted in African countries.”).

¹¹³ *Id.*; *but see* Sean McFate, *U.S. Africa Command: A New Strategic Paradigm?*, MIL. REV., Jan.–Feb. 2008, at 10, 17 (“Pentagon officials object to this perception, stressing that DOD will not be crossing into ‘other people’s lanes’ but simply wants to work more effectively with other agencies, recognizing the symbiotic relationship between it and the interagency in peace-building missions.”).

¹¹⁴ GAO-09-181, *supra* note 110, at 14 (“DoD has more resources and capacity than other U.S. agencies and could therefore overwhelm non-DOD agencies’ and organizations’ activities in Africa.”).

food, availability of educational opportunities, and elimination of disease.¹¹⁵ Moreover, African nations expressed severe discomfort with the prospect of stationing American troops on the continent.¹¹⁶ GAO notes that these concerns have caused AFRICOM to expend significant resources to combat misperceptions about the command.¹¹⁷ Significantly, the concerns noted above and the rampant mistrust present in Africa for DoD motivations forced the command to postpone plans for a headquarters on the continent in favor of a headquarters in Stuttgart, Germany.¹¹⁸

The preceding discussion of background, doctrinal foundation, mission set, command structure, and controversy surrounding AFRICOM demonstrates the interagency construct of the command. This becomes significant from a fiscal perspective in that it offers the potential for accessing multiple fiscal streams to finance its activities in the security assistance and humanitarian assistance field.

IV. AFRICOM Fiscal Authorities

A. Department of State Assistance Authorities

The Honorable Bill Alexander Opinion and 22 U.S.C. § 2151 establish the State Department as the lead federal agency tasked with conducting U.S. foreign policy.¹¹⁹ The State Department's assistance to foreign nations consists of civilian development, military development, and humanitarian assistance programs, with DoD often acting as the executing agent for State Department international military training programs in the pursuit of U.S. foreign policy objectives.¹²⁰ For purposes of the State Department's program interaction with AFRICOM, one must focus on the security assistance aspect of its foreign assistance programs. This is the area in which the most interaction between State and Defense takes place.

Security assistance programs are the primary method through which foreign partner capacity building and promotion of regional security goals are

¹¹⁵ See Michele Ruiters, Op-Ed., *Africa: Why U.S.'s AFRICOM Will Hurt Africa*, BUSINESS DAY (Johannesburg), Feb. 14, 2007, <http://allafrica.com/stories/200702140349.html>.

¹¹⁶ *Id.* ("Africom is meant to bring peace and security to the people of Africa, and promote common goals of development, health, education, democracy and economic growth. These are commendable ideals, but they are unilateral in their origin and their attachment to a military base or institutional framework leaves much to be desired.").

¹¹⁷ GAO-09-181, *supra* note 110, at 14.

¹¹⁸ *Id.* at 25.

¹¹⁹ 22 U.S.C. § 2151 (2006 & Supp. IV 2010); Hon. Bill Alexander, *supra* note 10.

¹²⁰ See generally 22 U.S.C. §§ 2151–2431 (2006 & Supp. IV 2010).

accomplished within the greater context of U.S. foreign policy.¹²¹ The legal foundation for security assistance programs—22 U.S.C. § 2151—requires that U.S. foreign development activities support five general goals: alleviation of suffering associated with global poverty, promotion of conditions enabling developing nations to sustain economic growth and benefits, encouragement of development processes that respect civil and economic rights and liberties, encouragement of integration of developing nations into international economic systems, and encouragement of good governance and the elimination of public corruption.¹²²

Security assistance programs typically occur in the form of transfers of military equipment and services through sales, leases, grants, drawdowns, and training. The U.S. foreign policy objective behind this activity is to increase foreign nations' ability to provide for their own regional security and thus facilitate their sharing of defense burdens.¹²³ The Secretary of State is tasked with supervision and general oversight responsibility for all security assistance programs conducted by the U.S. Government. State Department responsibilities include determining whether a program should be started, the scope of the program, and the amount of funding allocated to the program.¹²⁴ Security assistance activities require long range planning. The DoD participates in this process by submitting funding requests and developing plans, which detail how DoD's proposed actions will contribute to the U.S. Government security assistance effort.¹²⁵ The principal planning entities within the DoD for security assistance include the Defense Security Cooperation Agency (DSCA) and combatant commands.¹²⁶ DSCA is tasked with administering and supervising DoD security assistance programs,¹²⁷ while the various combatant commands develop plans for security assistance activities for their respective areas of responsibility.¹²⁸

The Department of State and DoD administer various programs encompassed within the security assistance framework. Those programs that DoD administers on behalf of the State Department include Foreign Military Sales (FMS), Foreign Military Financing (FMF), the International Military Education and Training Fund (IMET), the Excess Defense Articles (EDA), and

¹²¹ U.S. DEP'T OF DEF., MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL para. C1.1.1 (3 Oct. 2003) [hereinafter DODM 5105.38-M].

¹²² 22 U.S.C. § 2151(a).

¹²³ DODM 5105.38-M, *supra* note 121, para. C1.1.1.

¹²⁴ *Id.* para. C2.2.

¹²⁵ *Id.* para. C1.3.

¹²⁶ *Id.* para. C2.3.

¹²⁷ *Id.* para. C2.3.1.

¹²⁸ *Id.* para. C1.3.2.3.

Emergency Drawdown Authorities.¹²⁹ Major State Department administered security assistance programs in Africa that utilize DoD include the Global Peacekeeping Operations Initiative (GPOI)—also known as Voluntary Peacekeeping Operations—and the International Narcotics Control and Law Enforcement (INCLE).¹³⁰ These authorities are funded under three statutory bases: The Foreign Assistance Act of 1961, the Arms Export Control Act (AECA) of 1976, and annual appropriations acts.¹³¹

The FMS program allows the U.S. Government to enter into contracts—called Letters of Offer and Acceptance (LOA)—with foreign nations for the sale of military equipment, training, and services.¹³² A foreign nation must meet eligibility criteria to participate in the program.¹³³ Generally, the transaction must support U.S. national security interests, the items procured must be kept within the control of the purchasing nation, and the items must be maintained with the same level of security the U.S. would use to safeguard the item.¹³⁴ FMS sales to foreign nations may be suspended based on policy and legal reasons, such as the foreign nation’s involvement in terrorism or failure to adequately curb narcotics traffic.¹³⁵ The equipment, supplies, and services are provided from existing DoD stocks or procured on behalf of the purchasing nation.¹³⁶ Defense items provided under the program include not just the weapons and equipment but also logistic support packages.¹³⁷ FMS sales are not allowed for certain items, including systems procured from foreign sources or purchases of controversial weapons, such as napalm.¹³⁸ The FMS program is designed to operate at no cost to the U.S. Government, since the purchaser is required to pay full price for all services.¹³⁹ If the purchaser is not able to pay for the items immediately, the FMF program allows the President to permit the purchase of FMS items on a credit basis.¹⁴⁰ The FMF program is to be used for the acquisition of essential items as a financial option of last resort when no other means are available to fund the purchase.¹⁴¹ Loans under the FMF have to be repaid within a maximum repayment period of twelve years, unless exempted by law.¹⁴² In short, the FMS and FMF programs provide the means to augment

¹²⁹ *Id.* para. C1.1.2.

¹³⁰ *Id.*

¹³¹ *Id.* para. C1.2.1.

¹³² *Id.* para. C4.1.

¹³³ *Id.* para. C4.2.

¹³⁴ *Id.*

¹³⁵ *Id.* para. C4.2.4.

¹³⁶ *Id.* para. C4.3.1.

¹³⁷ *Id.* para. C4.3.3.

¹³⁸ *Id.* para.. C4.4.

¹³⁹ *Id.* para. C4.6.10.

¹⁴⁰ 22 U.S.C. § 2763 (2006 & Supp. IV 2010).

¹⁴¹ DODM 5105.38-M, *supra* note 121, para. C4.6.13.1.

¹⁴² *Id.* para. C4.6.13.3.

and upgrade partner militaries as part of U.S. foreign policy objectives around the world, including in Africa.

The Foreign Assistance Act and emergency drawdown authorities provide for Presidential authority to direct the drawdown of DoD items and services.¹⁴³ Drawdowns in unforeseen emergencies requiring immediate military response that cannot be provided for under any other provision of law are permitted by 22 U.S.C. § 2318(a)(1). The stocks transferred must be from existing DoD stocks and must not exceed a cap of \$100 million per fiscal year. The use of this authority requires a Presidential determination and congressional notification.¹⁴⁴ Drawdown of supplies and services from any government agency or of military education and training from DoD may be performed under 22 U.S.C. § 2318(a)(2) upon a Presidential determination that the drawdown is in the U.S. national interest. Drawdowns under this section are focused on counterdrug, disaster assistance, antiterrorism, anti-proliferation, refugee, and prisoners of war (POW) recovery activities.¹⁴⁵ Activities under this authority cannot exceed \$200 million, with caps of \$75 million from DoD, \$75 million for counterdrug activities, and \$15 million for POW recovery.¹⁴⁶ Congressional notification is required fifteen days prior to execution of counternarcotic and antiterrorism activities.¹⁴⁷ Drawdowns for peacekeeping operations are addressed in 22 U.S.C. § 2348a.¹⁴⁸ The statute authorizes the President to execute drawdowns of up to \$25 million per fiscal year to any government agency in the event of an unforeseen emergency arising during peacekeeping operations.¹⁴⁹ These authorities are an important tool that may be utilized to quickly augment allied militaries with existing DoD stocks in the event of emergency contingencies during peacekeeping operations, as well as in support of antiterrorism activities, two scenarios at play in Africa.

The EDA program is established under 22 U.S.C. § 2321j.¹⁵⁰ This program authorizes the transfer of excess defense items from existing DoD stocks.¹⁵¹ Eligible countries are those previously approved by Congress in annual Congressional Presentation Documents for military assistance programs.¹⁵² Items may be provided under this program only if they are excess

¹⁴³ 22 U.S.C. §§ 2318, 2348 (2006 & Supp. IV 2010).

¹⁴⁴ *Id.* § 2318(a)(1).

¹⁴⁵ *Id.* § 2318(a)(2).

¹⁴⁶ *Id.* § 2318(a)(2)(B).

¹⁴⁷ *Id.* § 2318(b).

¹⁴⁸ 22 U.S.C. § 2348a (2006 & Supp. IV 2010).

¹⁴⁹ *Id.* § 2348a(c).

¹⁵⁰ 22 U.S.C. § 2321j (2006 & Supp. IV 2010).

¹⁵¹ *Id.* § 2321j(a).

¹⁵² *Id.*

and if DoD procurement funds are not expended in executing the transfers.¹⁵³ Further, the transfers must not be detrimental to the readiness of U.S. Armed Forces or interfere with the American industrial base or its opportunities to do business with the purchasing nation.¹⁵⁴ Also, transfers of excess items on a grant basis must accrue more foreign policy benefits to the U.S. than a comparable sale of the items would.¹⁵⁵ The transfers are allowed to occur at no cost to the purchasing country provided it is in the national interest to do so, the recipient is receiving less than \$10 million in property, the total weight is under 50,000 pounds, and the transportation is on a space available basis.¹⁵⁶ Priority for delivery of these items is given to member countries of the North Atlantic Treaty Organization (NATO) on the southern and southeastern flank of NATO, major non-NATO allies on the southern and southeastern flank, and the Philippines.¹⁵⁷ Transfers under this authority are capped at \$425 million aggregate value per fiscal year.¹⁵⁸ Similar to the aforementioned FMS, FMF, and emergency drawdown authorities, the EDA authority provides an on-the-books program for commanders to provide vital equipment transfers to build the security capacity of allied nations. These programs have been a vital part of AFRICOM's efforts by making basic equipment available to augment African militaries.

The IMET program under 22 U.S.C. § 2347 provides funding to conduct military training for foreign military and civilian personnel.¹⁵⁹ Foreign civilian personnel from ministries other than those related to defense and nongovernmental civilians may attend the training with military students if their attendance at the training would promote more harmonious military civilian relationships, better administration of defense resources, improved cooperation on counterdrug efforts, and integration of human rights principles in military justice systems.¹⁶⁰ The training is authorized to take place in the United States as well as overseas.¹⁶¹ The statute additionally authorizes the President to seek reimbursement for the training provided under the IMET program.¹⁶² IMET programs fall under the authority of the State Department and the administration

¹⁵³ 22 U.S.C. § 2321j(b) (2006 & Supp. IV 2010).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 22 U.S.C. § 2321j(e) (2006 & Supp. IV 2010).

¹⁵⁷ 22 U.S.C. § 2321j(c)(2) (2006 & Supp. IV 2010).

¹⁵⁸ 22 U.S.C. § 2321j(g) (2006 & Supp. IV 2010).

¹⁵⁹ 22 U.S.C. § 2347(a) (2006 & Supp. IV 2010).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 22 U.S.C. § 2347(b) (2006 & Supp. IV 2010).

of DSCA. Congressional funding of IMET is dispersed by DSCA to the various military departments and combatant commands for conducting the training.¹⁶³

Section 2348 of title 22 of the *United States Code* provides authority for the President to provide support to peacekeeping operations that support U.S. national interests.¹⁶⁴ A significant program for AFRICOM under this authority is the African portion of the GPOI created in 2004.¹⁶⁵ The GPOI is a State Department administered program¹⁶⁶ that is intended to provide funding to address the shortage of trained indigenous peacekeeper capacity in volatile regions and assist global capacity to address crisis situations.¹⁶⁷ The program was initially designed to last five years and was authorized \$660 million.¹⁶⁸

In Africa, the African Contingency Operations Training and Assistance (ACOTA) program executes GPOI funded peacekeeping support operations.¹⁶⁹ The ACOTA program falls under the GPOI portion of the State Department Foreign Operations Appropriations Peacekeeping Accounts, also known as Peacekeeping Operations (PKO) accounts.¹⁷⁰ There are numerous goals for GPOI, including the training of 75,000 peacekeepers by 2010 and establishing a deployment and sustainment infrastructure to support peacekeeping efforts.¹⁷¹ GPOI activities are tailored to emphasize peacekeeping capacity in Africa.¹⁷² As of June 2008, the State Department had spent nearly \$98 million on Africa alone, training 40,000 peacekeepers and 2,700 instructors and providing equipment and transportation for peacekeeping operations worldwide.¹⁷³ General William E. "Kip" Ward, AFRICOM's former commander, testified in March 2009 that the numbers had increased to 68,000 trained soldiers and 3,500 trained instructors.¹⁷⁴

¹⁶³ DODM 5105.38-M, *supra* note 121, para. C10.6.

¹⁶⁴ 22 U.S.C. § 2348 (2006 & Supp. IV 2010).

¹⁶⁵ *Authorizations*, *supra* note 6, at 36 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

¹⁶⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-754, PEACEKEEPING: THOUSANDS TRAINED BUT UNITED STATES IS UNLIKELY TO COMPLETE ALL ACTIVITIES BY 2010 AND SOME IMPROVEMENTS ARE NEEDED 12 (2008) [hereinafter GAO 08-754].

¹⁶⁷ NINA M. SERAFINO, CONG. RESEARCH SERV., RL32773, THE GLOBAL PEACE OPERATIONS INITIATIVE: BACKGROUND AND ISSUES FOR CONGRESS 1-5 (2007).

¹⁶⁸ GAO-08-754, *supra* note 166, at 1.

¹⁶⁹ SERAFINO, *supra* note 167, at 3.

¹⁷⁰ *Id.*

¹⁷¹ GAO-08-754, *supra* note 166, at 6.

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 2-5.

¹⁷⁴ *Authorizations*, *supra* note 6, at 36 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

One further authority that should be considered is 22 U.S.C. § 2291, which states that it is U.S. policy to support international efforts that lead to the elimination of illegal drug production in major drug producing nations.¹⁷⁵ In pursuit of this objective, the statute provides authority for the President to provide assistance to any country or international organization engaged in anti-narcotic activity, as well as any other anti-crime activity.¹⁷⁶ The Secretary of State is provided explicit authority to coordinate these support efforts for the combating of international narcotic activities.¹⁷⁷ While this authority is generally available to fund anti-drug activities, Fiscal Year 2010 appropriations did not provide for specific INCLE funding for activities in Africa, so the ability of AFRICOM to leverage these funds is questionable, absent the State Department making them available as part of a broader program. This was a major source of funding in previous fiscal years for various anti-crime activities in Africa.¹⁷⁸ In addition, should criminal activity in Africa—such as international shipping piracy—rise to the level of threatening stability in the region, this authority could potentially be used to fund programs to combat such criminal activity.

General Ward has cited the Department of State authorities as critical to AFRICOM's mission accomplishment. In various testimonial appearances before both the House and Senate Armed Services Committee, General Ward cited the FMS, FMF, and EDA programs as providing vital equipment and training upgrades to African militaries that greatly facilitate interoperability with U.S. Armed Forces and having the long-term benefit of creating lasting capacity to deal with threats to regional stability without outside assistance.¹⁷⁹ General Ward also cites the IMET program as a critical training component that complements the equipment and defense infrastructure upgrades that are accomplished under the FMS, FMF, and EDA programs.¹⁸⁰ According to General Ward, the IMET program provides a critical long-term educational investment in future African leaders schooled in the principles of democracy, respect for civilian authority, and responsible government.¹⁸¹ This facilitates future cooperation on the continent in furtherance of U.S. national interests. Further, the peacekeeping capacity efforts of the ACOTA training program

¹⁷⁵ 22 U.S.C. § 2291(a) (2006 & Supp. IV 2010).

¹⁷⁶ *Id.* § 2291(a)(4).

¹⁷⁷ 22 U.S.C. § 2291(b)(1) (2006 & Supp. IV 2010).

¹⁷⁸ See generally Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2981 (2004); Supplemental Appropriations Act, 2008, Pub. L. No. 110-252, § 1410(b), 122 Stat. 2323, 2342 (2008); Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1893 (2009).

¹⁷⁹ See, e.g., *Authorizations, supra* note 6, at 35–36, 39–40, 103 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

¹⁸⁰ *Id.* at 35.

¹⁸¹ *Id.*

under the GPOI have created significant continental capacity to conduct and sustain indigenous peacekeeping operations by training nearly 68,000 peacekeepers and developing 3,500 military trainers.¹⁸² In addition to training manpower, infrastructure improvements under the ACOTA program to better coordinate peacekeeping efforts have been accomplished, including building a satellite communications network in West Africa to facilitate communication between peacekeeping partners.¹⁸³ Ward cites the combination of the FMS, FMF, EDA, IMET, and GPOI-ACOTA programs as creating a corps of capable, democratically oriented partner nations able to prevent conflict rather than reacting to it.¹⁸⁴

The synergistic application of the disparate authorities discussed in this section reflect the underlying construct laid out in The Honorable Bill Alexander Opinion, with the State Department operating in the lead to provide security assistance programs and DoD acting as the implementing agent.¹⁸⁵ Significantly, one can see the accomplishment of DoD combatant command active security objectives under this construct, even without the existing DoD specific authorities.¹⁸⁶

B. Department of Defense Assistance Authorities

The Honorable Bill Alexander Opinion and 22 U.S.C. § 2151 provide that while the State Department is the lead federal agency tasked with conducting U.S. foreign policy, DoD can provide limited training to foreign military forces when it is truly for the purposes of interoperability and familiarization.¹⁸⁷ Incidental DoD humanitarian assistance in conjunction with its military mission is permissible.¹⁸⁸ In addition, DoD may conduct either security or humanitarian assistance if specifically authorized to do so. Otherwise, DoD is forbidden from funding or performing foreign assistance on its own.¹⁸⁹ Specific authorities that allow DoD to exercise limited humanitarian assistance and limited security assistance are considered below.

DoD global humanitarian assistance authorities are primarily funded through Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) appropriations. The OHDACA appropriation funds disparate authorities that

¹⁸² *Id.* at 36.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 35–36, 39–40, 103.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* at 29–47.

¹⁸⁷ 22 U.S.C. § 2151 (2006 & Supp. IV 2010); Hon. Bill Alexander, *supra* note 10.

¹⁸⁸ Hon. Bill Alexander, *supra* note 10.

¹⁸⁹ Furin, *supra* note 49, at 5–6.

allow limited humanitarian operations by the military,¹⁹⁰ to include statutes relating to Humanitarian Assistance,¹⁹¹ Humanitarian Assistance Program-Excess Property,¹⁹² Humanitarian Demining Assistance,¹⁹³ and Foreign Disaster Assistance.¹⁹⁴ Humanitarian and Civic Assistance (HCA) activities are funded with service O&M accounts.¹⁹⁵ The 2008 Department of Defense Appropriations Act (DODAA) provided \$103.3 million in OHDACA funding, with \$40 million available over the course of three years through 30 September 2010.¹⁹⁶ The 2009 DODAA provided \$83 million in OHDACA funding would remain available until 30 September 2010.¹⁹⁷ Further funding will need to be accomplished in future appropriations acts to continue OHDACA activities. The use of OHDACA funding for DoD humanitarian assistance activities is governed by DoD's Security Assistance Management Manual, which appoints the DSCA as the agency responsible for direction, administration, and supervision of all DoD security assistance program executions.¹⁹⁸ We will next address the major assistance authorities and their use by AFRICOM.

Section 401 of title 10 of the *United States Code* allows DoD to provide HCA to foreign local populations in conjunction with ongoing military operations.¹⁹⁹ The Secretary of the military department conducting the activities must determine the assistance will benefit both U.S. and host nation security interests and enhance the operational readiness skills of the military members performing the assistance.²⁰⁰ The assistance is meant to be basic and must complement, not duplicate, any assistance being provided by other departments of the U.S. Government.²⁰¹ Further, HCA must not be provided to persons or entities involved in military or paramilitary activities and should instead serve the basic economic and social needs of the local population assisted.²⁰² HCA activities under this authority must be approved by the Secretary of State, since the State Department has statutory lead in foreign assistance activities.²⁰³

¹⁹⁰ DODM 5105.38-M, *supra* at note 121, para. C12.2.

¹⁹¹ 10 U.S.C. § 2561 (2006 & Supp. IV 2010).

¹⁹² 10 U.S.C. § 2557 & 2561 (2006 & Supp. IV 2010).

¹⁹³ 10 U.S.C. § 407 (2006& Supp. IV 2010).

¹⁹⁴ 10 U.S.C. § 404 (2006 & Supp. IV 2010).

¹⁹⁵ 10 U.S.C. § 401 (2006 & Supp. IV 2010).

¹⁹⁶ Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295, 1303 (2007).

¹⁹⁷ Department of Defense Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3610 (2008).

¹⁹⁸ DODM 5105.38-M, *supra* note 121, para. C2.3.1.

¹⁹⁹ 10 U.S.C. § 401.

²⁰⁰ *Id.*

²⁰¹ *Id.* § 401(a).

²⁰² *Id.* § 401(a)(2)-(3).

²⁰³ *Id.* § 401(b).

HCA activities are commonly funded through combatant commander O&M accounts. The statute authorizes the reimbursable use of military O&M accounts to finance these activities, but the costs must be incidental.²⁰⁴ Section 401 of title 10 defines “humanitarian assistance activities” as basic medical, surgical, dental, and veterinary care in underdeveloped rural areas; construction of rudimentary roads; digging of wells and construction of basic sanitation infrastructure; and basic construction and repair.²⁰⁵ DoD Instruction 2205.02, Humanitarian and Civic Assistance Activities, further elaborates that HCA activities described in 10 U.S.C. § 401 must be distinguished from similar activities that are conducted for the benefit of military personnel and result in a collateral and unintentional benefit to the local population.²⁰⁶ The purpose and intent of HCA activities are “to create strategic, operational and/or tactical effects that support Combatant Commander objectives in theater security cooperation or designated contingency plans while concurrently reinforcing skills required for the operational readiness of the forces executing the HCA mission.”²⁰⁷ Therefore, the activities are not meant to be all encompassing or to replace State Department efforts but are intentionally limited and focused on particular combatant commander objectives in the respective area of operations. These projects require vetting at combatant command level and preapproval.²⁰⁸

In addition to the authorizations discussed above, 10 U.S.C. § 2561 provides authority for DoD to use humanitarian assistance funds to provide transportation to humanitarian relief supplies worldwide and for other humanitarian purposes.²⁰⁹ The project must further U.S. national security interests.²¹⁰ The activities provided for in this authorization encompass limited but more substantial efforts, including the use of contractors for infrastructure improvements and rudimentary construction, humanitarian training, and transportation of supplies.²¹¹ The funding is provided through OHDACA funds.²¹² Approval for these projects is at the combatant command and DSCA levels, with congressional reporting requirements.²¹³

²⁰⁴ *Id.* § 401(c); *see also* DODM 5105.38-M, *supra* note 121, paras. C12.2 & C12.3.4.

²⁰⁵ 10 U.S.C. § 401(e).

²⁰⁶ U.S. DEP’T OF DEF., INSTRUCTION 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE ACTIVITIES, para. 4(c) (2 Dec. 2008) [hereinafter DODI 2205.02].

²⁰⁷ *Id.* para. 4(d).

²⁰⁸ *Id.* para. 4(a)(6); *see also* DODM 5105.38-M, *supra* note 121, para. C12.3.4.2.

²⁰⁹ 10 U.S.C. § 2561(a) (2006 & Supp. IV 2010).

²¹⁰ DODM 5105.38-M, *supra* note 121, para. C12.3.2.

²¹¹ *Id.*

²¹² *Id.* para. C12.2 & C12.3.2.1.

²¹³ *Id.* para. C12.3.2.2 & C12.3.2.3.

Section 2557 of title 10 provides authority for DoD to donate excess supplies to the State Department for distribution for humanitarian purposes.²¹⁴ Requests for excess items may be made to combatant commanders by the appropriate U.S. Embassy.²¹⁵ The items donated must be non-lethal.²¹⁶ DoD is responsible for the collection, maintenance, and transportation of these items to the U.S. Embassy, which then distributes the items.²¹⁷ The donated items must predominantly benefit the host nation's civilians and may be donated to the host nation military if the use of the supplies will be for civilian benefit.²¹⁸ The costs associated with these activities are funded with OHDACA appropriations.²¹⁹

In the event of foreign disasters, 10 U.S.C. § 404 authorizes combatant commanders to immediately respond to disasters when necessary to prevent the loss of life or serious harm to the environment.²²⁰ The use of this authority occurs at the direction of the President to the Secretary of Defense and allows the provision of transportation, supplies, services, and equipment to those in need and is funded under OHDACA appropriations.²²¹ However, if the disaster is environmental, limits may be placed on the provision of transportation so long as alternate means of transportation are available.²²² The use of this authority requires notification to Congress within forty-eight hours.²²³

Humanitarian authorizations include humanitarian demining assistance under 10 U.S.C. § 407 in conjunction with U.S. military operations, provided the assistance furthers the national security interests of the United States or improves the operational readiness skills of the military personnel involved.²²⁴ Similar to 10 U.S.C. § 401 authorities cited above, the demining assistance must compliment and not duplicate any other programs being performed by other agencies in the country.²²⁵ The intent of the statute is to provide assistance to improve the foreign country's ability to locate, remove, and destroy landmines.²²⁶ The statute clearly states that U.S. personnel may not directly participate in the physical detection, removal, or detonation of landmines but merely provide support to the host nation's ability to do so.²²⁷ The provision of

²¹⁴ 10 U.S.C. § 2557 (2006 & Supp. 2010).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ DODM 5105.38-M, *supra* note 121, para. C12.3.1.

²¹⁹ *Id.* para. C12.2.

²²⁰ 10 U.S.C. § 404(a) (2006 & Supp. 2010).

²²¹ 10 U.S.C. § 404(b)–(d) (2006 & Supp. 2010).

²²² 10 U.S.C. § 404(e) (2006 & Supp. 2010).

²²³ *Id.* § 404(c).

²²⁴ *Id.* § 407(a)(1).

²²⁵ *Id.* § 407(a)(2).

²²⁶ *Id.* § 407.

²²⁷ *Id.* § 407(a)(3).

this aid requires Secretary of State approval.²²⁸ The statute provides a maximum of \$10 million may be expended under this authority, and it is primarily funded through OHDACA.²²⁹

Sections 402 and 2561 of title 10 provide for the transportation of humanitarian supplies.²³⁰ Section 2561 allows DoD to transport humanitarian supplies worldwide using DoD funds.²³¹ The transportation of supplies can be on behalf of non-profit and private humanitarian organizations and must be humanitarian.²³² Hazardous, religious, or political materials are not allowed to be transported under this authority.²³³ Also, this authority cannot be used to transport supplies on behalf of military or paramilitary entities.²³⁴ OHDACA appropriations provide the funding source for this statute.²³⁵ Similarly, section 402, the Denton Program, allows for the transportation of humanitarian supplies on a space available basis without charge to the private humanitarian organization.²³⁶ Under this authority, the Secretary of Defense must determine that the transportation of supplies is in the interests of the United States, the supplies are suitable for use, there is a legitimate humanitarian need for the supplies, the supplies will be used for humanitarian purposes, and distribution arrangements have been made for the transported supplies.²³⁷ Like section 2561, section 402 prohibits the transport of humanitarian supplies for military use.²³⁸ OHDACA provides the funding for this authorization.²³⁹

The Combatant Commander's Initiative Fund (CCIF), codified in 10 U.S.C. § 166a, represents an additional source of funds for combatant commands, including AFRICOM.²⁴⁰ The statute allows the Chairman of the Joint Chiefs of Staff to provide funds to combatant commanders, at their request, for a variety of authorized activities.²⁴¹ The provision of funds is limited to \$20 million used to purchase items that exceed the cost threshold for investment unit

²²⁸ *Id.* § 407(b)(1).

²²⁹ *Id.* § 407(c).

²³⁰ 10 U.S.C. §§ 402, 2561 (2006 & Supp. IV 2010).

²³¹ *Id.* § 2561 (2006 & Supp. IV 2010).

²³² *Id.*

²³³ DODM 5105.38-M, *supra* note 121, para. C12.3.5.1.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ 10 U.S.C. § 402 (2006 & Supp. IV 2010).

²³⁷ *Id.* § 402(b)(1).

²³⁸ *Id.* § 402(c)(2).

²³⁹ DODM 5105.38-M, *supra* note 121, para. C12.2 & C12.3.6.

²⁴⁰ 10 U.S.C. § 166a (2006 & Supp. IV 2010).

²⁴¹ *Id.* § 166a(a) (listing the following authorized activities: (1) force training; (2) contingencies; (3) selected operations; (4) command and control; (5) joint exercises; (6) humanitarian and civic assistance coordinated with the State Department; (7) foreign military training and education expenses; (8) defense personnel expenses for regional and bilateral cooperation activities; (9) force protection; and (10) joint war-fighting capabilities).

items—\$250,000—found in 10 U.S.C. § 2245a;²⁴² no more than \$10 million for paying the expenses of foreign country participation in joint exercises; and no more than \$5 million to provide military training and education to foreign military and civilian personnel.²⁴³ The statute prohibits the provision of funding for any purposes that Congress denied authorization.²⁴⁴ Moreover, CCIF funding is explicitly in addition to other funding available for the activities specified in subsection (b) of the statute.²⁴⁵ In addition to the fiscal limitations of the funds, the statute requires submitting a request to the Joint Chiefs of Staff to be vetted with other competing submissions.²⁴⁶ This process reflects the slow-moving, high-level nature of this authority. Also, when one considers that this funding is available to all combatant commands, the amounts available are fairly small.

Emergency and Extraordinary Expenses funding (EEE) is also available under 10 U.S.C. § 127, which allows the Secretary of Defense and the subordinate service secretaries to provide funds for unanticipated expenses that were not foreseeable.²⁴⁷ The statute forbids dispersal of funds totaling more than \$1 million without fifteen days advance notice to Congress and five days advance notice for amounts totaling between \$500,000 and \$1 million.²⁴⁸ If U.S. national security interests are threatened by application of the above notification requirements, the Secretary of Defense has the authority to immediately issue the money.²⁴⁹ However, the Secretary of Defense must notify Congress with justification, the amounts expended, and the purpose of the expenditure.²⁵⁰

In addition to the title 10 authorities listed above, which specifically provide for limited humanitarian assistance and limited foreign forces training, Congress has provided specific authority for DoD to conduct capacity building for foreign military forces. Specifically, section 1206 of the Fiscal Year 2006 National Defense Authorization Act (NDAA) authorizes the President to direct the Secretary of Defense to conduct or support the building of foreign national military capacity to conduct counterterrorist operations or participate in or support military and stability operations in which U.S. forces are involved.²⁵¹

²⁴² 10 U.S.C. § 2245a (2006 & Supp. IV 2010).

²⁴³ *Id.* § 166a(d).

²⁴⁴ *Id.* § 166a(e).

²⁴⁵ *Id.* § 166a(b), (d).

²⁴⁶ *Id.* § 166a(c).

²⁴⁷ 10 U.S.C. § 127(a) (2006 & Supp. IV 2010).

²⁴⁸ 10 U.S.C. § 127(c) (2006 & Supp. IV 2010).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1206(a), 119 Stat. 3136, 3456–58 (2006).

As the capacity building language suggests, the provision of equipment, supplies, and training is included in the authorization.²⁵² The support authorized in section 1206 may not be used to support countries to which the State Department has denied assistance.²⁵³ The support program administered to the receiving foreign nation must include some form of training encouraging respect for basic human rights and fundamental freedoms and respect for civilian authority.²⁵⁴ The Secretaries of Defense and State are required to coordinate regarding development of capacity building programs, as well as in the implementation of those programs.²⁵⁵ Congress requires written notification fifteen days before initiating assistance.²⁵⁶ The Fiscal Year 2009 NDAA authorized the extension of the program until 30 September 2011.²⁵⁷ In addition, the 2009 NDAA provided \$350 million in funding for foreign capacity building.²⁵⁸ The 2010 NDAA limited the allocation of the \$350 million authority to only \$75 million to assist foreign nations to build their capacity to take part in exercises with U.S. Armed Forces.²⁵⁹ Significantly, Congress has identified the need for section 1206 funding in AFRICOM to be compelling and deserving of a disproportionate share of these resources.²⁶⁰

A particularly useful authority was provided to DoD in section 1207 of the 2006 NDAA.²⁶¹ It allows the transfer of funds to the Department of State for use in stability operations.²⁶² Specifically, the authority allowed DoD to transfer articles and funds to the State Department for use in reconstruction, security, and stabilization activities with foreign nations.²⁶³ The section allows up to \$100 million to be provided under this authority each fiscal year.²⁶⁴ The authority to transfer these funds expired on 30 September 2010.²⁶⁵ Additional extensions will have to be provided to continue to utilize this authority. The application of this authority further requires congressional notification and provides that the funds, once transferred, become subject to any limitations

²⁵² § 1206(b)(1), 119 Stat. at 3457.

²⁵³ § 1206(c)(3), 119 Stat. at 3457.

²⁵⁴ § 1206(b)(2), 119 Stat. at 3457.

²⁵⁵ § 1206(d), 119 Stat. at 3457.

²⁵⁶ § 1206(e)(2), 119 Stat. at 3456–58.

²⁵⁷ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1206(b), 122 Stat. 4356, 4625 (2008).

²⁵⁸ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1206(b), 122 Stat. 4356, 4625 (2008).

²⁵⁹ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1206, 123 Stat. 2190, 2514 (2009).

²⁶⁰ S. REP. NO. 110-335, at 400–01 (2008).

²⁶¹ § 1207, 119 Stat. at 3458–59.

²⁶² § 1207(a), 119 Stat. at 3458.

²⁶³ § 1207(a), 119 Stat. at 3458.

²⁶⁴ § 1207(b), 119 Stat. at 3458.

²⁶⁵ § 1201, 123 Stat. at 2511.

imposed on them by the Foreign Assistance Act of 1961 or any other laws applicable to the activities funded.²⁶⁶ When one considers this authority with section 1206, the potential for interagency cooperation that these authorities provide is impressive.

The DoD assistance authorities cited above represent a broad range of statutory and fiscal authority that allows the DoD to engage in security and humanitarian assistance activities as an important tool of U.S. foreign policy.²⁶⁷ While some have criticized these authorities as limited and far too restrictive,²⁶⁸ the fact remains that these authorities are a important and often used tools in the conduct of AFRICOM's operations and the foreign policy of the U.S. Government.²⁶⁹ General Ward, AFRICOM's former commander, has indentified the title 10 authorities as playing a significant role in AFRICOM's mission accomplishment.²⁷⁰ For example, General Ward highlights that title 10 humanitarian assistance authorities are often used in a manner that complements and supports humanitarian efforts carried out by both USAID and the State Department, thus "multiply[ing] the effectiveness of Humanitarian Assistance . . . programs."²⁷⁰ In addition, humanitarian assistance activities provide collateral benefits beyond help to foreign civilian populations or improvement of U.S. military personnel skill sets. General Ward testified to the Senate Armed Services Committee that humanitarian assistance activities perform a dual purpose by:

[I]mprov[ing] security by reducing a cause of instability . . . [and] affect[ing] perceptions and plac[ing] the U.S. in a positive light—especially in areas susceptible to extremist ideologies. . . . HA helps stabilize and secure regions, bolsters a country's capability to respond to disasters (thereby mitigating future USG involvement), provides training opportunities for U.S. forces and provides an example of what a professional military can accomplish. While the Defense HA budget is small compared to State and USAID which have primary responsibility in this regard, it has a disproportionate impact as a highly visible and positive engagement activity in

²⁶⁶ § 1207(d)–(e), 119 Stat. at 3458–59.

²⁶⁷ E.g., Palmer *supra* note 7, at 84.

²⁶⁸ See *Authorizations*, *supra* note 6.

²⁶⁹ *Id.*

²⁷⁰ *Authorizations*, *supra* note 6, at 37 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

support of our efforts to create an environment inhospitable to the influences of terrorism.²⁷¹

In addition, the execution of humanitarian activities by AFRICOM helps to build partnerships and establish relationships that can be utilized later in furtherance of U.S. foreign policy objectives.²⁷² General Ward's comments highlight that even limited humanitarian assistance activities can shape the perception of U.S. power as benevolent. In addition, the relationships created and strengthened through positive interaction developed while conducting humanitarian activities helps to develop partnerships that facilitate the accomplishment of AFRICOM objectives. Moreover, the point highlights that the effectiveness of these authorities must be analyzed within the overall context of U.S. foreign policy.

Another source of DoD funding cited as critical to AFRICOM's efforts are the authorities found in sections 1206 and 1207 of the 2006 NDAA.²⁷³ These authorities have been cited as providing critical flexibility to combatant commanders by giving both DoD and the State Department the ability to shift resources to address critically vulnerable nations or opportunities to strengthen foreign partners.²⁷⁴ General Ward has emphasized that sections 1206 and 1207 transfer authorities have been instrumental in the progress of U.S. efforts in Africa.²⁷⁵ The use of these authorities early in nations where the security situation might deteriorate reduces the risk that U.S. military troops would have to be deployed to deal with a crisis situation and helps to build the at-risk nation's capacity to handle the problem internally.²⁷⁶ The praise associated with these resources and their extension in subsequent appropriations bills demonstrates the continued need and valued capability that they provide to AFRICOM.

²⁷¹ *Budget Request*, *supra* note 82, at 142 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁷² *Authorizations*, *supra* note 6, at 37 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁷³ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 1206–1207, 119 Stat. 3136, 3456–59 (2006).

²⁷⁴ *Defining the Military's Role toward Foreign Policy: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 14–15, 19–20 (2008) (statement of Eric S. Edelman, Under Secretary for Policy, Department of Defense).

²⁷⁵ *Authorizations*, *supra* note 6, at 103 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁷⁶ See *Budget Request*, *supra* note 82, at 146, 148 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

C. Interagency Funded Programs

In addition to the authorities that are specifically appropriated to the State Department and DoD, AFRICOM utilizes various programs that are not specifically appropriated by Congress but by various agencies with organic funding methods in an interagency manner. Two examples of this type of program are the Trans-Sahara Counterterrorism Partnership (TSCTP) and the President's Emergency Plan for AIDS Relief (PEPFAR).²⁷⁷ Each of these programs utilizes interagency funding streams for their fiscal support.²⁷⁸

The TSCTP was developed in 2005 to bolster the security capacity of northwest African nations—Morocco, Algeria, Tunisia, Mauritania, Senegal, Mali, Niger, Chad, and Nigeria—in the face of expanding militant extremism in the region.²⁷⁹ The TSCTP program is an interagency program comprised of the State Department, USAID, and DoD, with the overall program headed by the State Department.²⁸⁰ Within the interagency construct, the State Department focuses on diplomacy, USAID focuses on development, and DoD executes the military training activities in support of overall program objectives.²⁸¹ Some of the specific military activities conducted by DoD in support of the program include counterterrorism training to foreign national forces, intelligence capacity building training programs, and security capacity building activities.²⁸² DoD also provides support to State Department diplomacy efforts by improving communication capacities between the government and local population and by providing basic humanitarian assistance under its title 10 authorities.²⁸³

But this program is different from those authorities previously discussed, because it does not have specific appropriations from Congress.²⁸⁴ Instead, the various agencies participating in the program fund its activities through various sources appropriated to the individual agencies. For example, the State Department leverages its PKO account—in addition to other State Department authorities—and DoD utilizes its 1206 and 1207 authorities to support the program.²⁸⁵ In this way the TSCTP spent \$230 million from 2005 to

²⁷⁷ *Authorizations*, *supra* note 6, at 34–35 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁷⁸ *Id.* at 34–37, 39 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁷⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-860, COMBATING TERRORISM: ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF TRANS-SAHARA COUNTERTERRORISM PARTNERSHIP 5 (2008) [hereinafter GAO 08-860].

²⁸⁰ *Id.* at 1.

²⁸¹ *Id.* at 7.

²⁸² *Id.* at 16.

²⁸³ *Id.* at 16–20.

²⁸⁴ *Id.* at 9.

²⁸⁵ *Id.*

2007 and allocated an additional \$123 million to fund its activities in 2008.²⁸⁶ This highlights an important element to the interagency participation and funding of the program. DoD, while performing its military mission within the greater context of a the State Department program, realizes a windfall of benefit from the diplomatic and civilian development activities executed by the State Department and USAID. The success and accomplishments of the civilian agencies in promoting a more stable and secure environment also benefits DoD in the accomplishment of its mission, since overall stability is achieved or progressed without DoD having to fully leverage its fiscal authorities for the total benefit obtained. In addition to touting the success of the TSCTP in improving counterterrorism capacity in the Trans-Sahara area, General Ward also seemed to validate the previous point when he stated:

AFRICOM's strategy of Active Security guides the development of our support to a holistic interagency effort to meet the challenges facing Africa today. However, Africa requires an approach focused on more than just security. To that end, we recognize and support U.S. [G]overnment efforts to further strengthen and resource our interagency partners such as the State Department, USAID, and others. These agencies have lead responsibility and are crucial to bringing a balanced team approach to capacity building-not only in Africa, but globally.²⁸⁷

The PEPFAR, another program funded from a variety of interagency sources, was developed in 2003 to address the spread of HIV/AIDS in Africa, Asia, and the Caribbean.²⁸⁸ The State Department operates the program through its Office of U.S. Global AIDS Coordinator (OGAC) and implements prevention, treatment, and education programs in countries with expanding HIV/AIDS rates.²⁸⁹ Initially authorized \$15 billion in 2003 for five years, the program was extended in 2008 and authorized \$48 billion.²⁹⁰ PEPFAR activities in Africa have been extensive, with focused programs taking place in Botswana, Ivory Coast, Ethiopia, Kenya, Mozambique, Namibia, Nigeria, Rwanda, South Africa, Tanzania, Uganda, and Zambia.²⁹¹ DoD executes a \$78 million dollar portion of the program providing HIV/AIDS prevention programs

²⁸⁶ *Id.*

²⁸⁷ *Budget Request, supra* note 82, at 143 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁸⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-666, PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF: PARTNER SELECTION AND OVERSIGHT FOLLOW ACCEPTED PRACTICES BUT WOULD BENEFIT FROM ENHANCED PLANNING AND ACCOUNTABILITY 1 (2009) [hereinafter GAO 09-666].

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

to African militaries that have had significant readiness problems caused by the disease among its personnel.²⁹²

General Ward, in testimony before the Senate, stated that DoD's contribution to the PEPFAR program has been funded through a cocktail-like mix of fiscal authorities, to include:

[T]he DoD HIX/AIDS Prevention Program Office using a congressional supplemental provided via the Office of the Secretary of Defense Health Affairs Defense Health Program; the State Department Office of the U.S. Global AIDS Coordinator using [PEPFAR]; and the State Department, using the HIV/AIDS Military Health Affairs FMF program.²⁹³

The results of the program cannot be denied. General Ward relates that the PEPFAR program has achieved tangible results, to include almost 500,000 African troops receiving prevention training and education, over 100,000 African troops and their families receiving testing services, hundreds of senior leaders receiving national health policy training focused on HIV/AIDS prevention, and thousands of health care professionals receiving training as well.²⁹⁴ Perhaps most significantly, over 18,000 personnel were placed on treatment medication under the program.²⁹⁵ It is important to note that these figures are military-focused and do not take account of the additional efforts undertaken by the State Department or USAID under the program. The awareness and prevention steps taken under the program represent long-term investment in the stability of the societal infrastructure that undergirds many African nations that find themselves besieged by HIV/AIDS pandemics. This creates conditions that contribute to regional civilian and, by extension, military stability, which furthers the goals of AFRICOM.

The results obtained by PEPFAR show the powerful potential of interagency cooperation to accomplish AFRICOM objectives. The ability to use funding sources other than those available to DoD indirectly extends the pool of money available to DoD and, thus, expands the areas where DoD efforts can have an impact. This multiplies the impact of DoD efforts and results in tangible stabilization gains. This in turn creates a more harmonious operational

²⁹² Jerry P. Lanier, Foreign Policy Advisor, U.S. Afr. Command, Address at 4th Annual Reconstruction and Stabilization Conference (Feb. 18, 2009), <http://www.africom.mil/printStory.asp?art=2735>.

²⁹³ *Authorizations*, *supra* note 6, at 36 (statement of General William E. Ward, U.S. Army, Commander, U.S. Africa Command).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

environment by reducing the intensity of the factors that contribute to instability, such as poverty and disease. Further, the PEPFAR program demonstrates Congress' flexibility in providing a role for DoD in a program focused on traditional civilian health relief efforts and highlights an excellent example of a program addressing Africans' concerns utilizing a variety of agencies within traditional fiscal constructs. The fiscal resources highlighted from the State Department, DoD, and interagency programs provide a wide pool of fiscal resources that AFRICOM may leverage. Next, the challenges that the command faces from a fiscal perspective are considered below.

V. AFRICOM: Fiscally Starved or Fiscally Sound?

Having considered the major fiscal authorities and programs utilized by AFRICOM, one must now analyze the various fiscal challenges facing the command. This discussion provides relevant context to an analysis of AFRICOM funding adequacy, since these challenges limit the effectiveness of the command's fiscal resources. The fiscal challenges facing AFRICOM are primarily infrastructure costs, lack of fiscal parity with civilian partners, uncertain future threat environments, and the limited nature of the fiscal authorities currently utilized. The challenges listed above and the limited nature of AFRICOM fiscal authorities, in particular, have led to the argument that AFRICOM is underfunded.

One of the great fiscal challenges AFRICOM currently faces is the cost of establishing infrastructure to support DoD's newest command. Original plans for AFRICOM envisioned a headquarters presence on the continent of Africa itself, but these plans were scuttled in the face of enormous resistance from African nations who feared a precursor to a permanent American military presence in Africa.²⁹⁶ As an alternative, AFRICOM established its headquarters at Kelley Barracks, Stuttgart, Germany. This resulted in massive costs to upgrade the infrastructure of facilities at Kelley Barracks to house the command on an interim basis. In addition, infrastructure upgrades were made in U.S. Embassies in Africa to accommodate DoD personnel required to facilitate the interagency coordination so vital to AFRICOM. The total cost, excluding construction costs for a new headquarters in Africa, is estimated by the GAO to exceed \$4 billion spread across upcoming fiscal years until fiscal year 2015.²⁹⁷

These infrastructure costs are important, because they will significantly impact the ability of AFRICOM to leverage significant investments into the command. In other words, more money to AFRICOM will not necessarily result

²⁹⁶ GAO-09-181, *supra* note 110, at 24–25.

²⁹⁷ *Id.* at 23.

in more money to projects aimed at accomplishing AFRICOM mission objectives, since the proportion of the total allocated funds absorbed by infrastructure costs would be significant. One could argue for targeted allocations, but these funds would seem to be wasted if the command lacked the infrastructure to properly execute its programs. This would suggest that a prudent course of action for the new combatant command would be to keep its sole funded projects limited to smaller scale programs, unless it can participate in projects that enjoy fiscal support from multiple sources. According to the GAO, the Secretary of Defense appears to favor this approach and has postponed a decision on a permanent headquarters for AFRICOM until fiscal year 2012, deeming it more important that the command gain better operational and situational awareness to validate future budget requests.²⁹⁸ This offers support to a more conservative approach by AFRICOM in its initial years from an operational and, by extension, fiscal perspective, until it matures into a more stable command.

Another significant challenge facing the command is the lack of fiscal parity with civilian partners such as the State Department and USAID. The core concern underlying this challenge is the fact that DoD as a whole enjoys a far more robust pool of funding and resources than does USAID and the State Department, even though the State Department is the agency lead for U.S. foreign policy. The GAO identified the funding disparity between the military and civilian agencies as a key factor in provoking fears that the mission set of AFRICOM would lead to a militarization of American foreign policy on the continent.²⁹⁹ Many feared that the overwhelming preponderance of fiscal resources by DoD would by default lead to a prioritization of military efforts on the continent above all others, since its projects would be better financed.³⁰⁰ Further, this disparity would place DoD in the *de facto* lead among federal entities operating on the continent, since it would have more money, despite federal statutory mandates giving the State Department the lead.³⁰¹ This would, in turn, hinder civilian agency efforts on the continent as they would lack funds and, therefore, lack credibility. Further, a heavy military presence overshadowing civilian efforts among African nations would harm the ability to foster a benevolent, as opposed to militaristic, perception of U.S. policy on the continent.³⁰²

This fiscal challenge for AFRICOM is relevant because of the interagency approach that AFRICOM wishes to pursue on the continent in a

²⁹⁸ *Id.* at 27.

²⁹⁹ GAO-08-947T, *supra* note 100, at 16.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

manner consistent with NSPD 44 and respectful of the Department of State's lead. This means that the command and policy makers will seek to have AFRICOM's efforts restrained and in harmony with efforts by civilian agencies. Congress will likely intentionally avoid providing specific budget authority—such as those available in Afghanistan and Iraq—to AFRICOM, instead restricting the command to standard title 10 fiscal authorities available to all of DoD. Further, as a practical matter, other combatant commands are executing their missions utilizing special authorities, such as the Commander's Emergency Response Program³⁰³ and Iraq/Afghanistan specific funding authorities. This means that AFRICOM currently has fairly liberal access to standard DoD fiscal authorities under title 10 and the authorization acts, limited though they are. However, competition for these resources could become tighter once the current conflicts in Iraq and Afghanistan end. This further suggests that DoD should learn to leverage the interagency approach to maximize the impact of its fiscal expenditures, since future fiscal prospects for the command appear limited.

The fiscal challenges facing the command have led some to criticize the fiscal approach by AFRICOM to rely on basic authorities found in title 10 and authorization acts.³⁰⁴ The chief criticism is title 10 funds are limited and AFRICOM cannot possibly accomplish its mission set with the cumbersome authorities it currently utilizes.³⁰⁵ One critic argues the unique nature of the command compels special funding beyond current authorities.³⁰⁶ These special authorities would allow the combatant commander flexibility to fully engage with African partners and maximize DoD's impact on the continent.³⁰⁷ The foundation of this argument is that current fiscal authorities utilized by AFRICOM under title 10 and OHDACA are insufficient due to their limited funding, the tight restrictions on their use, and the level of coordination with the Department of State required for their use.³⁰⁸ Additionally, AFRICOM has to compete with other commands to utilize these sources and lacks control over the programs it participates in as part of its core mission.³⁰⁹ Ultimately, these constraints on the command could lead to its mission being severely undermined and ineffective.³¹⁰

³⁰³ See Furin, *supra* note 49, at 16 (explaining the background and characteristics of the program that provides appropriated funds directly to operational commanders in Iraq and Afghanistan for urgent humanitarian and reconstruction projects); see also JA 422, *supra* note 25, at 282–84 (2008).

³⁰⁴ Palmer, *supra* note 7, at 83–84.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 84.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

However, what these points fail to address is Congress' intentional placement of fiscal limitations on AFRICOM, designed to subordinate DoD activities to the lead of the State Department in conducting foreign capacity building and security assistance. The absence of specific authority from Congress enabling the combatant commander to conduct security assistance in Africa as the lead agency makes sense after considering the controversy that surrounded the founding of AFRICOM. The command faces a trust deficit that might be corrected through an effort that emphasizes civilian control of U.S. foreign policy in the region and the diligent establishment of a record of benevolent activity on the continent that is beneficial to the African nations it supports.

In addition, the argument that DoD cannot accomplish its mission in Africa under the current construct ignores the activity of the State Department and USAID in furthering U.S. interests in economic and development activities. Efforts by the State Department, DoD, and USAID complement each other and allow for collateral benefits that indirectly further the individual interests of each of the respective agencies. National Security Agency's Dennis Penn makes this point when he discusses the concept of "3D security engagement."³¹¹ Penn states that because the 3D concept includes "development and diplomacy as equal parts of the security strategy equation, the 3D concept deemphasizes the militaristic aspect of security engagement. It also advances the views reflected in major U.S. policy edicts."³¹² Penn states this concept envisions each of the pillars being led by the State Department, DoD, or USAID, with the other agencies playing supporting roles.³¹³ The effort is collaborative and works to achieve the goals of the U.S. Government as a whole.³¹⁴ This highlights not only the collaborative effort envisioned by the 3D concept and governing regulations but also the fallacy of simply throwing more money and more authority at one entity over the other. The collaborative efforts of all three entities creates collaborative benefits, since successes in the development and diplomacy field contribute to more stable societies in Africa and, thus, generate a more harmonious security situation. By contrast, successes in the security realm further efforts in the diplomacy and development realms as well. This suggests that funding in AFRICOM would be more effectively spread amongst the State Department, the DoD, and USAID, as accomplishments in one area of effort benefit the efforts of the other agencies. This approach would facilitate the achievement of the common goal of enhancing stability on the continent before, rather than after, conflict starts.

³¹¹ Dennis Penn, *USAFRICOM: The Militarization of U.S. Foreign Policy?*, JOINT FORCES Q., Oct. 2008, at 74, 77.

³¹² *Id.* at 77.

³¹³ *Id.*

³¹⁴ *Id.*

VI. Conclusion

While AFRICOM faces numerous challenges and difficulties, one must conclude that the command does not need additional fiscal resources to accomplish its mission. The current fiscal authorities available to it as part of title 10 DoD statutory authorizations and the command's participation in security capacity building activities through State Department financed programs provide sufficient fiscal resources to accomplish AFRICOM's mission as it currently stands.

The sufficiency of AFRICOM's fiscal authorities is reflected by the doctrinal underpinnings of AFRICOM, which mandate intergovernmental efforts and cooperation among the various civilian and military arms of government. NSPD 44 and DoDD 3000.05 both make clear that interagency efforts in the field of stability operations are the paradigm through which the U.S. Government will accomplish its objectives, and they make clear that the Department of State is the lead federal agency for that effort.³¹⁵ AFRICOM is uniquely structured, with its integration of Department of State personnel into its command structure, to operate in the intergovernmental manner envisioned by policy makers.³¹⁶ Excessive amounts of funding focused on DoD alone would defeat the purpose of the intergovernmental cooperation concept by emphasizing a military rather than civilian approach on the continent and would, thus, be counterproductive in the face of the distrust that is present.

Second, the standard DoD title 10 security assistance authorities are intended to be limited, so DoD cannot act in a manner that would hinder civilian efforts in the humanitarian assistance and foreign capacity building arenas. Indeed, the limited nature of the title 10 authorities forces DoD to be a team player when it comes to supporting the State Department as the lead agency in development assistance. Arguments for specified appropriations for AFRICOM ignore the fact that the security aspect of conflict prevention is but one prong of U.S. foreign policy. AFRICOM participation in programs focused on developing the civilian and military infrastructure of at-risk nations creates a direct benefit for the command. State Department funded programs like the TSCTP, ACOTA, and PEPFAR create both direct and collateral benefits for the command by improving the security infrastructure of the various nations touched by the programs and allowing AFRICOM to be seen operating on the continent in a benevolent and constrained way that has the potential to build trust. Further, the partnerships developed through the execution of these

³¹⁵ NSPD 44, *supra* note 70, at 2, 5; DODI 3000.05, *supra* note 73, para. 4.

³¹⁶ AFRICOM, *supra* note 50, at 10 (statement of Theresa Whelan, Deputy Assistant Secretary of Defense for African Affairs).

programs create an infrastructure of cooperation for the command to enable an effective response in the event of a contingency requiring military force.

A final factor supporting the conclusion current authorities are sufficient for AFRICOM is that the command is extremely young and, as yet, does not have a firm infrastructure in place to support its efforts.³¹⁷ The lack of infrastructure has operated as a fiscal drain on the command, as there is not an in-place infrastructure of security cooperation through established alliance systems with individual nations. Indeed, the operational environment for AFRICOM is hostile.³¹⁸ Many African nations fear the U.S. is attempting to spread its influence militarily on the continent and AFRICOM is the vehicle through which this military expansion will take place. So rampant is the distrust that AFRICOM has had to postpone, if not forego, plans for a headquarters on the continent.³¹⁹ This trust deficit must be addressed, and an overly funded combatant command would do little to dispel local fears. Instead, core relationships have to be nurtured and built at this stage of AFRICOM's development. Staying fiscally conservative and utilizing the interagency approach will facilitate the fostering of trust for the command and will allow the command to establish a record of accomplishment from which it can expand and build as it becomes more relevant on the continent. Excessive funding for DoD centered programs without coordination with interagency partners could result in waste and poorly executed efforts that would do more damage to perceptions of AFRICOM's purpose. In short, they would defeat the purpose of interagency coordination.

In conclusion, the current fiscal structure available to AFRICOM is sufficient for the command to accomplish its mission. The establishment of a long-term DoD commitment to Africa, with AFRICOM as its vanguard, will be judged not by the largesse of the money used to support it, but by the tangible results achieved in pursuit of U.S. foreign policy objectives. AFRICOM's efforts must, therefore, be reasoned, coordinated, and tailored to achieve maximum effect in harmony with civilian efforts on the continent. The success of this effort will likely be subtle, represented by what does not take place as much as by what does. One can only hope the success of U.S. efforts in the region will make incidents like pirate standoffs and debilitating wars a distant memory that is long forgotten in an Africa realizing its vast potential.

³¹⁷ GAO-09-181, *supra* note 110, at 14, 25.

³¹⁸ *Id.*

³¹⁹ *Id.*

FREEDOM OF NAVIGATION, ENVIRONMENTAL PROTECTION, AND COMPULSORY PILOTAGE IN STRAITS USED FOR INTERNATIONAL NAVIGATION

Lieutenant Commander Jeanine B. Womble, JAGC, USN*

I. Introduction

Famously referred to as “a constitution for the oceans,”¹ the United Nations Convention on Law of the Sea (UNCLOS) endeavors to coherently bring together the multitude of issues concerning the world’s oceans into a single framework international instrument.² The convention’s preamble is evidence of the careful balance required to bring together parties with often divergent priorities:

[E]stablishing through this convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment³

* Lieutenant Commander Womble is a judge advocate in the U. S. Navy, presently assigned as a Senior Trial Counsel at the Navy Litigation Office, Washington Navy Yard, D.C. She earned a bachelor of arts degree from Bryn Mawr College in 1997, a doctor of jurisprudence degree from Florida State University College of law in 2004, and a master of laws degree from The George Washington University Law School in 2010. She is licensed to practice law in the Commonwealth of Virginia. This paper was submitted in partial completion of George Washington University Law School's requirements for the master of laws degree in environmental law. The views expressed herein are solely those of the author and do not reflect the official positions of the Department of Defense or the Department of the Navy.

¹ Official Records of the Third United Nations Conference on the Law of the Sea, 11th Sess., 185th plen. mtg. (Vol. XVII) at 13, U.N. Doc. A/CONF.62/SR.185, ¶ 47 (6 Dec. 1982), available at http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_sr-185.pdf.

² See *id.*

³ United Nations Convention on the Law of the Sea pmb., Dec. 10, 1982, 1833 U.N.T.S 3 [hereinafter UNCLOS].

The balance between peaceful uses, such as commercial shipping, and the preservation of the marine environment is particularly difficult to maintain. Many commentators worry that coastal states' efforts to protect the marine environment will destabilize the Convention.⁴ Authors offer dire predictions that limitations on the freedom of navigation in the name of marine environmental protection "may upset the carefully crafted balance of interests reflected in the Convention and lead the international community down the slippery slope of unilateral assertion of rights and return to the 'creeping jurisdiction' anarchy that the Convention was thought to have put to rest."⁵ Language such as "slippery slope," "anarchy," and "unravel"⁶ illustrate the intensity of the sentiment supporting the freedom of navigation regime set forth in UNCLOS. However, as with any constitution, the document must evolve to meet the needs of the community it currently serves. Awareness about threats to the marine environment has grown since UNCLOS was opened for signature in 1982. Even before this rise in concerns about the environment, the use of "constructive ambiguity"⁷ was often necessary to achieve consensus among the diverse interests taking part in the United Nations (UN) Law of the Sea Conferences.⁸

One of the innovations of UNCLOS is the regime of transit passage through straits used for international navigation. Straits used for international navigation are a focal point for both environmental and freedom of navigation concerns. But even the choice of this clumsy term is an illustration of the "constructive ambiguity" of UNCLOS as coastal states were concerned that the term "international strait" would imply that the straits belonged to the international community and not to the coastal states bordering them.⁹

The transit passage regime in these straits has been and will likely continue to be an international friction point as coastal states, maritime powers,

⁴ See, e.g., Bernard H. Oxman, *Centennial Essay, The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L. L. 830 (2006).

⁵ Richard J. Grunawalt, *Freedom of Navigation in the Post-Cold War Era*, in NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 11, 17 (Donald R. Rothwell & Sam Bateman eds., 2000).

⁶ *Id.*

⁷ "Constructive ambiguity" has been described as a process by which parties to a treaty disguise their disagreement by crafting vague language that must be resolved by courts, administrators, and customary state practice. Hiram E. Chadoh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 990 n.84 (1995). Those in favor of the strategy point out that it permits a rule to evolve in response to factors that the drafters could not foresee. *Id.* Of course, such a strategy makes it easier to justify non-compliance.

Id.

⁸ Grunawalt, *supra* note 5, at 16.

⁹ Hasjim Djalal, *The Law of the Sea Convention and Navigational Freedoms*, in NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA, *supra* note 5 at 1, 3.

and the International Maritime Organization (IMO) struggle with finding the correct balance between freedom of navigation and protection of the marine environment. What follows is a discussion of the history of freedom of navigation, the regime of transit passage, and the conflicting interpretations of applicable UNCLOS provisions governing navigation through straits used for international navigation. In particular, this paper will look at compulsory pilotage in straits used for international navigation with a focus on the controversy surrounding the compulsory pilotage regime in the Torres Strait between Australia and Papua New Guinea and the potential for future pilotage regimes in the Straits of Malacca and the Singapore Strait.

II. History of Freedom of Navigation

The issue of how to divide and utilize the world's oceans is not a new one. The beginning of the Age of Exploration saw the world's oceans divided between Spain and Portugal by a papal bull promulgated by Pope Alexander VI.¹⁰ One hundred years later in 1609, the Dutch natural rights jurist Hugo Grotius published *Mare Liberum* (The Free Seas) advocating for the Dutch East India Company's right to navigate the Indian Ocean and other seas to trade with India and Southeast Asia.¹¹ Grotius' work is considered by many to be "the first, and classic, exposition of the doctrine of the freedom of the seas."¹² Grotius argued no one can own the sea, and it cannot be considered the territory of any people.¹³ He considered it the "first principle" of the law of nations that "every Nation is free to travel to every other Nation, and trade with it."¹⁴

However, complete freedom of the seas was not universally appreciated. While a boon to the Dutch, for many non-European countries this freedom brought colonialism and the exploitation of their adjacent fishing grounds by far-away maritime powers.¹⁵ Not all Europeans were equally enamored of the unfettered freedom of the seas. While Great Britain did its fair share of colonizing, the English scholar John Seldon wrote the most influential

¹⁰ Hasjim Djalal, *Remarks on the Concept of "Freedom of Navigation,"* in FREEDOM OF THE SEAS, PASSAGE RIGHTS, AND THE 1982 LAW OF THE SEA CONVENTION 65, 65 (Myron Nordquist, Tommy T. B. Koh & John Norton Moore eds., 2009).

¹¹ HUGO GROTIUS, MARE LIBERUM (Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916 (1609), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=552&chapter=90870&layout=html&Itemid=27; see also R.P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA 2–3 (1982).

¹² W.S.M Knight, *Seraphin de Freitas: Critic of Mare Liberum*, 11 TRANSACTIONS GROTIUS SOC'Y 1 (1926); see also ANAND, *supra* note 11, at 8.

¹³ GROTIUS, *supra* note 11.

¹⁴ *Id.*

¹⁵ Djalal, *supra* note 10, at 65.

response to Grotius, *Mare Clausum* (Closed Sea).¹⁶ Written at the behest of King James and published by command of King Charles, *Mare Clausum* espoused England's sovereign right to the waters surrounding Great Britain and Ireland.¹⁷ Seldon argued that it was not contrary to the law of nature for a nation to forbid free navigation and commerce. He rebutted the contention that "the sea was inexhaustible from promiscuous use,"¹⁸ stating that a sea could be degraded by other nation's fishing and navigation and that valuable resources such as pearls and corals could be diminished through the exploitation of countries exercising freedom of the seas.¹⁹

The idea of a nation's sovereignty over the waters surrounding it became more concrete with the publication of Cornelius van Bynerschoek's *De Dominio Maris* (The Dominion of the Sea) in 1703.²⁰ Bynerschoek declared that a country's dominion ended at the reach of its armaments.²¹ The "cannon shot rule" was made more precise in 1782 by the Italian jurist Galiani, who suggested that three miles be the universal boundary of state sovereignty.²²

Even with the three mile buffer, freedom of the seas—taking on an almost sacred connotation—continued to expand beyond its "legitimate" navigation purposes and became a means for strong maritime powers to subjugate peoples from countries who were not as strong militarily.²³ Freedom of the seas was a license to overfish the waters far away from your own national boundaries.²⁴

This pattern continued as the maritime powers asserted their varying definitions of freedom of the sea, often in conflicting ways, preventing a truly predictable law of the sea from forming.²⁵ The freedom of the seas remained a Euro-centric doctrine often used to the detriment of developing countries through the end of the Second World War.²⁶ With the rise of the United States and Soviet Union as the dominant world powers, the decline of colonialism and emergence of developing countries as players on the newly created international stage of the UN, and the growth of technologies that allowed for greater exploitation of the high seas, the doctrine of a completely free and inexhaustible

¹⁶ ANAND, *supra* note 11, at 105.

¹⁷ *Id.*

¹⁸ *Id.* at 106.

¹⁹ *Id.*

²⁰ *Id.* at 138.

²¹ *Id.*

²² *Id.* at 139.

²³ *Id.* at 152.

²⁴ *Id.* at 153.

²⁵ *Id.* at 159–60.

²⁶ *Id.* at 161.

sea became increasingly inadequate.²⁷ Against this backdrop, and on the recommendation of the UN International Law Commission, the conferences that would lead to the UNCLOS began in 1958.²⁸ Smaller states argued the maritime powers had abused the freedom of the seas and it “could no longer be regarded as sacrosanct or absolute, just as sovereignty itself was not absolute.”²⁹

This historical background, coupled with the twenty-four years of negotiation required to achieve a signed treaty in 1982 and the additional negotiation and discussion that helped UNCLOS finally come into force in 1994, illustrate that the concepts of “freedom of the seas” and the related “freedom of navigation” do not readily lend themselves to simple definitions. These concepts have been, and always will be, contentious. Especially in the area of marine environmental protection, UNCLOS has its cheerleaders and its critics. While some characterize UNCLOS as the “strongest and most comprehensive environmental treaty in existence or likely to emerge for quite some time,”³⁰ critics of UNCLOS contend that the Convention codifies the very existing customs that have failed to prevent oil accidents and unduly favored the interests of maritime states.³¹ In recent years, one of the flashpoints of controversy has related to the use of straits used for international navigation.

III. The Regime of Transit Passage

“‘Strait’ is not a term of art, and is not defined in any of the conventions. . . . [I]t bears its ordinary meaning. . . . [I]t is the legal status of the waters constituting a strait and their use for international shipping . . . that determines the rights of coastal and flag states.”³² Prior to UNCLOS, the right of passage through a strait depended on whether the strait was part of the high seas or the territorial sea of a coastal state.³³ If part of a territorial sea, the right

²⁷ *Id.* 161–63.

²⁸ *Id.* at 176.

²⁹ Official Records of the United Nations Conference on the Law of the Sea, 1st Comm., 14th mtg., (Vol. III) at 42, U.N. Doc. A/CONF.13/C.1/SR.11, para. 43 (13 Mar. 1958), available at http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/docs/english/vol_III/8_11TH_TO_15TH_MEETINGS_1st_Cttee_vol_III_e.pdf; see also ANAND, *supra* note 11, at 177.

³⁰ David A. Colson, *United States Accession to the United Nations Convention on the Law of the Sea*, 7 GEO. INT'L ENVTL. L. REV. 651, 670 (1995); see also Craig J. Capon, *The Threat of Oil Pollution in the Malacca Strait: Arguing for a Broad Interpretation of the United Nations Convention on the Law of the Sea*, 7 PAC. RIM. L. & POL'Y J. 117, 135 (1998).

³¹ Capon, *supra* note 30, at 135.

³² R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 102 (3d ed. 1999).

³³ *Id.*

to transit was one of innocent passage, a right that could be suspended by the coastal state for security reasons.³⁴

The strategic importance of straits to maritime states is considerable. Free passage through international straits is a matter of both economic and national security. Conversely, coastal states may be reluctant to allow foreign ships that might be detrimental to their economies or environments to pass through straits without additional conditions being placed upon them.³⁵ The result of this conflict was the compromise regime of transit passage, allowing more freedom to transiting ships than they would be allowed under an innocent passage regime but less than they would exercise on the high seas.³⁶

As stated earlier, the right to transit passage applies only to straits used for international navigation. This is defined as the “continuous and expeditious transit of the strait between one part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zone.”³⁷ Ships may operate in “normal modes.”³⁸ This is a point of particular importance to naval vessels, as it allows submarines to transit the strait submerged and air capable ships to launch aircraft.³⁹ Article 38(1) carves out a limited exception to transit passage in straits formed by an island of a state bordering the strait.⁴⁰ In these straits innocent passage is the governing transit regime.⁴¹

Some maritime powers have suggested that the regime of transit passage is now a part of customary international law;⁴² however, this assertion remains controversial.⁴³ While a customary right akin to transit passage may have emerged in certain straits such as the Straits of Gibraltar and Straits of Dover, it is less certain that a general right of transit passage exists worldwide.⁴⁴

Coastal states are limited in the actions they can take in straits used for international navigation. “States bordering straits shall not hamper transit passage. . . . [T]here shall be no suspension of transit passage.”⁴⁵ Bordering

³⁴ *Id.*

³⁵ *Id.* at 105.

³⁶ *Id.*

³⁷ UNCLOS, *supra* note 3, art. 38(2).

³⁸ *Id.* art. 39(1).

³⁹ Lieutenant Commander William E. Tower III, Creeping Jurisdiction, Are International Straits in Jeopardy? (5 Feb. 1999) (unpublished unclassified paper, Naval War College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA363191&Location=U2&doc=GetTRDoc.pdf>.

⁴⁰ UNCLOS, *supra* note 3, art. 38(1).

⁴¹ *Id.* art. 45.

⁴² Churchill & Lowe, *supra* note 32.

⁴³ *Id.* at 110–13.

⁴⁴ *Id.* at 113.

⁴⁵ UNCLOS, *supra* note 3, art. 44.

states are authorized to designate sea lanes and traffic separation schemes in straits used for international navigation.⁴⁶ Before making these designations, the bordering states must submit their proposals to a competent international organization.⁴⁷

UNCLOS article 42 covers the permissible laws and regulations that states bordering straits can adopt related to transit passage.⁴⁸ Article 42(1)(a) allows border states to implement laws and regulations relating to “safety and regulation of maritime traffic, as provided in article 41.”⁴⁹ The interpretation of the last clause of this article has become a focal point in the legal debate over how far coastal states may go in protecting the marine environment from the environmental hazards associated with shipping in and around straits used for international navigation.

IV. “Particularly Sensitive Sea Areas” (PSSA) and Associated Measures

International shipping activities present a spectrum of threats to sensitive marine environments. Individual ships, especially those carrying oil and other noxious cargo, present a risk from operational discharges, oil accidents related to groundings and collisions, and physical damage to marine habitats and organisms.⁵⁰ The sheer volume of shipping traffic has raised the potential for adverse environmental effects enormously.⁵¹ This threat is at its highest in straits used for international navigation, where a huge volume of tanker traffic passes through narrow, often shallow choke points daily.⁵²

There are a number of tools available to improve the safety of navigation. Whether as a primary objective or secondary benefit, these tools also often protect the environment.⁵³ “[P]ollution control and safety are very closely linked, because the best way to maintain safety and to prevent pollution

⁴⁶ *Id.* art. 41.

⁴⁷ *Id.* art. 41(4).

⁴⁸ *Id.* art. 42.

⁴⁹ *Id.* art. 42(1)(a).

⁵⁰ Int'l Maritime Org. [IMO], *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, IMO Assemb. Res. A.982 (24), Annex, para. 2.2 (1 Dec. 2005), available at http://www5.imo.org/SharePoint/blastDataHelper.asp?data_id%3D25322/A982%2824%29.pdf.

⁵¹ *Id.*

⁵² See generally *World Oil Transit Chokepoints*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Full.html (last visited Feb. 24, 2012).

⁵³ Julian Roberts, *Protecting Sensitive Marine Environments: The Role and Application of Ships' Routeing Measures*, 20 INT'L J. MARINE & COASTAL L. 135, 136 (2005).

is to preserve the integrity of the ship.”⁵⁴ UNCLOS article 41 specifically mentions sea lanes and traffic separation schemes, but other measures, such as ships’ routing and reporting systems and the Universal Shipborne Automatic Identification Systems (AIS), are part of the IMO’s safety of navigation program.⁵⁵

One of the newest arrows in the coastal state’s quiver of environmentally protective measures is the PSSA. A PSSA is “an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities.”⁵⁶ At the time of designation, an appropriate associated measure must be approved by the IMO to prevent or mitigate the threat to the area.⁵⁷ The IMO guidelines specifically list ships’ routing and reporting systems and areas to be avoided as possible associated protective measures for PSSAs.⁵⁸ However, the guidelines leave open the possibility that the IMO may develop and adopt “other measures aimed at protecting specific sea areas against environmental damage from ships, provided that they have an identified legal basis.”⁵⁹

UNCLOS does not specifically mention PSSAs, but article 211 gives the IMO authority to designate areas within the exclusive economic zone where “special mandatory measures for the prevention of pollution from vessels [are] required for technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic . . .”⁶⁰ A coastal state must request this designation from a competent international organization. In this case, that organization is the IMO. Once designated, a coastal state may adopt, with the IMO’s approval, stricter laws and regulations aimed at the prevention of pollution from vessels in the designated area.⁶¹ Both UNCLOS and the PSSA guidelines leave open the question of whether a PSSA can be designated in a strait used for international navigation.⁶²

⁵⁴ U.K. DEP’T OF TRANSP., SAFER SHIPS, CLEANER SEAS: REPORT OF LORD DONALDSON’S INQUIRY INTO THE PREVENTION OF POLLUTION FROM MERCHANT SHIPPING, para 1.11 (1994); *see also* Roberts, *supra* note 53, at 136 n.5.

⁵⁵ *IMO and the Safety of Navigation*, IMO, <http://www.imo.org/OurWork/Safety/Navigation/Pages/Default.aspx> (last visited Feb. 24, 2012).

⁵⁶ IMO, *supra* note 50, Annex, para. 1.2.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 6.1.2.

⁵⁹ *Id.* ¶ 6.1.3.

⁶⁰ UNCLOS, *supra* note 3, art. 211(6)(a).

⁶¹ *Id.*; *see also* Robert C. Beckman, *PSSAs and Transit Passage—Australia’s Pilotage System in the Torres Strait Challenges the IMO and UNCLOS*, 38 Ocean Dev. & Int’l L. 325, 328 (2007).

⁶² Beckman, *supra* note 61, at 328.

V. The Great Barrier Reef PSSA

At the 30th session of the Marine Environment Protection Committee (MEPC) of the IMO in 1990, MEPC considered two Australian requests related to the Great Barrier Reef. In the end MEPC passed two resolutions.⁶³ The first designated the Great Barrier Reef as a PSSA.⁶⁴ The second addressed the associated measures for the newly designated PSSA, stating in relevant part:

[MEPC] RECOMMENDS that Governments recognize the need for effective protection of the Great Barrier Reef region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage for merchant ships 70m in length or over or oil tankers, chemical tankers and gas tankers, irrespective of size navigating the inner route of the Great Barrier Reef between the northern extreme of Cape York Peninsula . . . and Hydrographers Passage.⁶⁵

The MEPC resolution's language was further buttressed by the 1991 amendments to Australia's Great Barrier Reef Marine Park Act of 1975 which criminalized "navigating without a pilot in a compulsory pilotage area"⁶⁶ and "entering an Australian port after navigating in a compulsory pilotage area without a pilot."⁶⁷

VI. The Torres Strait

In 2003, Australia and Papua New Guinea jointly requested that the IMO extend the Great Barrier Reef PSSA and its associated compulsory pilotage regime to the Torres Strait.⁶⁸ This was the first time that the IMO was confronted with the issue of whether compulsory pilotage, imposed as an associated protective measure after designation of a PSSA, was permissible in a strait used for international navigation.⁶⁹

⁶³ *Id.*

⁶⁴ IMO, Marine Env't Prot. Comm. [MEPC], *Identification of the Great Barrier Reef Region as a Particularly Sensitive Area*, IMO Doc. MEPC.44(30) (16 Nov. 1990).

⁶⁵ *Id.*

⁶⁶ Darin Honchin, *Criminal Responsibility in Relation to Offences in the Great Barrier Reef Marine Park*, AUSTL. INST. CRIMINOLOGY, <http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/~media/publications/proceedings/26/honchin.ashx> (last visited Jan. 18, 2012).

⁶⁷ *Id.*

⁶⁸ Beckman, *supra* note 61, at 330.

⁶⁹ *Id.*

The Torres Strait lies between Papua New Guinea and the Cape York Peninsula in northern Australia. The waters are shallow and treacherous.⁷⁰ There are many islands, islets, reefs, and shoals that are hazardous to navigation.⁷¹ In addition, the tidal regime of the strait is unpredictable.⁷² Visibility and radar propagation are often diminished by squalls and storms.⁷³ Vessels use the Prince of Wales Channel to transit the Torres Strait.⁷⁴

In 1987, the IMO adopted a resolution that promoted voluntary pilotage in the Torres Strait.⁷⁵ Over time, compliance with the voluntary pilotage dropped dramatically.⁷⁶ This drop in voluntary compliance was one of the factors in Australia's proposal to the IMO requesting compulsory pilotage in the Torres Strait.⁷⁷

The proposal was considered by the Sub-Committee on Safety of Navigation (NAV Sub-Committee). It found the proposed scheme "was operationally feasible and largely proportionate to provide protection to the marine environment."⁷⁸ That said, the Nav Sub-Committee noted the diverse views on the legality of such a regime and recommended that MEPC refer the matter to the Legal Committee.⁷⁹ "In the final analysis, the Committee remained divided on resolving the legality of compulsory pilotage in straits used for international navigation."⁸⁰

Ultimately, MEPC designated the Torres Strait as an extension of the Great Barrier Reef PSSA and, after much additional debate, included language very similar to that used in 1990:

3. [MEPC] RECOMMENDS that Governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage for merchant ships 70 m in length and over or oil

⁷⁰ Sam Bateman & Michael White, *Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment*, 40 OCEAN DEV. & INT'L L. 184, 185 (2009).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 187.

⁷⁵ *Id.* at 191.

⁷⁶ *Id.*

⁷⁷ Beckman, *supra* note 61, at 330.

⁷⁸ *Id.* at 332.

⁷⁹ *Id.*

⁸⁰ IMO, Legal Comm., *Report of the Legal Committee on the Work of Its Eighty-Ninth Session*, para. 241, IMO Doc. LEG 89/16 (4 Nov. 2004).

tankers, chemical tankers, and gas tankers, irrespective of size when navigating:

- (a) the inner route of the Great Barrier Reef between the northern extreme of Cape York Peninsula . . . and Hydrographers Passage; and
- (b) the Torres Strait and the Great North East Channel between Booby Island . . . and Bramble Cay . . .⁸¹

VII. Controversy over Compulsory Pilotage

The debate within the IMO over pilotage in the Torres Strait was a harbinger of the controversy to come. In May 2006, Australia issued Marine Notice 8/2006 announcing revised pilotage requirements in the Torres Strait.⁸² The text of the notice mirrors the recommendatory language of the IMO resolution, but then states the following:

A new compulsory pilotage area for the Torres Strait will be specified in Marine Orders Part 54 and further details of that area are reproduced below. Significant penalties will apply to a master or owner who fails to comply with the compulsory pilotage requirements in the Navigation Act and Marine Orders Part 54.⁸³

This notice set off a firestorm of controversy in the international and academic communities. The debate was centered in two areas: whether Australia acted in bad faith during the IMO discussions which led to the IMO resolution and whether a regime of compulsory pilotage in a strait used for international navigation is consistent with UNCLOS.

Marine Notice 8/2006 was answered with diplomatic notes of protest from the United States and Singapore.⁸⁴ The United States indicated that it believed Australia's institution of a compulsory pilotage regime was contrary to international law as reflected in UNCLOS.⁸⁵ Singapore's note focused on

⁸¹ IMO, MEPC, *Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area*, IMO Doc. MEPC.133(53) (22 July 2005).

⁸² AUSTL. MAR. SAFETY AUTH., MARINE NOTICE 8/2006, REVISED PILOTAGE REQUIREMENTS FOR TORRES STRAIT (2006), available at http://www.amsa.gov.au/shipping_safety/marine_notices/2006/documents/0806.pdf.

⁸³ *Id.*

⁸⁴ Beckman, *supra* note 61, at 337.

⁸⁵ *Id.*

Australia's apparent acceptance of the United States' statement that the resolution was recommendatory and did not provide a legal basis for the imposition of a mandatory pilotage scheme in the Torres Strait.⁸⁶ One of Australia's responses to the diplomatic uproar over Marine Notice 8/2006 was to issue Marine Notice 16/2006. It clarified that the pilotage requirements did not apply to sovereign immune vessels and that Australian domestic legislation offered defenses from prosecution for failure to carry a pilot due to "unavoidable cause."⁸⁷ In addition, the notice took great pains to articulate Australia's position with respect to transit passage, stating:

[T]he carriage of an Australian pilot will have the effect of enhancing transit passage, with the ability to maximise tidal window opportunities for transit and ensuring adequate margins for safety and environmental protection. . . .

In accordance with UNCLOS Articles 42.2 and 44, Australian authorities will not suspend, deny, hamper or impair transit passage and will not stop, arrest or board ships that do not take on a pilot while transiting the Strait. However, the owner, master and/or operator of the ship may be prosecuted on the next entry into an Australian port, for both ships on voyages to Australian ports and ships transiting the Torres Strait en route to other destinations.⁸⁸

The issue of whether Australia overstepped the bounds of the authority it was given in IMO Resolution MEPC 133(53) is not purely academic. Throughout UNCLOS part III, it is apparent that coastal states are to take action only in the context of applicable international regulations and with the approval of competent international organizations.⁸⁹ The IMO is the accepted competent authority in this area. UNCLOS article 39(2) is written broadly enough to allow the IMO significant latitude in regulating both safety at sea and marine pollution.⁹⁰ "If there were a clear legal basis for the IMO to adopt compulsory pilotage systems and they were adopted by the IMO according to its authority, procedures and practices, all ships exercising transit passage would be bound to comply with them under article 39 of UNCLOS."⁹¹

⁸⁶ *Id.*

⁸⁷ AUSTL. MAR. SAFETY AUTH., MARINE NOTICE 16/2006, FURTHER INFORMATION ON REVISED PILOTAGE REQUIREMENTS FOR TORRES STRAIT (2006), available at http://www.amsa.gov.au/shipping_safety/marine_notices/2006/Marine_Note_16-2006.asp.

⁸⁸ *Id.*

⁸⁹ See generally UNCLOS, *supra* note 3, arts. 41–42.

⁹⁰ *Id.* art 39(2); Beckman, *supra* note 61, at 346.

⁹¹ Beckman, *supra* note 61, at 347.

Therein lies the heart of the concern related to Australia's actions. If the IMO never intended to give Australia the authority to implement a compulsory pilotage program in the Torres Strait and Australia understood this and imposed a compulsory pilotage regime anyway, then its compulsory pilotage regime could be viewed as just the creeping jurisdiction via unilateral state action that UNCLOS was, in part, written to prevent. In this scenario, the Torres Strait pilotage regime could be seen as a dangerous precedent, not because compulsory pilotage could never be consistent with transit passage, but because Australia acted to impose compulsory pilotage despite the IMO's use of recommendatory language. Australia's argument that its actions after IMO resolution MEPC 133(53) are no different than they were when the Great Barrier Reef PSSA was designated is compelling to a point.⁹² But this argument ignores the fact that ships are not passing through the Great Barrier Reef PSSA under the regime of transit passage.

VIII. Interpretation of UNCLOS Articles 42 and 43

Separate from the dialogue surrounding IMO resolution MEPC 133(53) and Australia's authority under it is a more fundamental debate over whether UNCLOS provides a legal basis for the imposition of a compulsory pilotage regime in a strait at all. The heart of the argument turns on the interpretation of UNCLOS article 42, paragraph 1(a) and how it relates to articles 41 and 43. Article 42 gives states the authority to adopt laws and regulations that effect transit passage relating to "the safety of navigation and the regulation of maritime traffic, as provided in article 41."⁹³ Article 41 addresses the right of states bordering straits to develop sea lanes and traffic separation schemes after referral to a competent international organization.⁹⁴

Under the more permissive interpretation, article 41 only modifies "the regulation of maritime traffic," leaving open a wider range of regulatory options for actions related to safety of navigation.⁹⁵ Proponents of this interpretation also look to article 43, which suggests border and user states agree to cooperate "in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and for the prevention, reduction and control of pollution from ships."⁹⁶ This article is particularly interesting for a number of reasons. First, it makes clear that user states have a responsibility to cooperate in achieving both navigational safety

⁹² See generally Beckman, *supra* note 61.

⁹³ UNCLOS, *supra* note 3, art. 42(1) (a); see also Beckman, *supra* note 61, at 344.

⁹⁴ UNCLOS, *supra* note 3, art 41.

⁹⁵ Bateman & White, *supra* note 70, at 194.

⁹⁶ UNCLOS, *supra* note 3, art. 43; Bateman & White, *supra* note 70, at 194.

and abatement of pollution in international straits.⁹⁷ Second, it lists “other improvements in aid of international navigation” as one of the areas in which user states should cooperate with border states.⁹⁸ “It is arguable that this includes cooperating to apply and enforce compulsory pilotage on those vessels that pose the greatest risk.”⁹⁹

The alternative reading of these articles suggests that the list of allowable laws and regulations in article 42 is restrictive,¹⁰⁰ with article 41 modifying both safety of navigation and regulation of maritime traffic in article 42(1)(a).¹⁰¹ In addition, article 42(1)(b) not only gives border states the ability to “giv[e] effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances into a strait”¹⁰² but also limits border states’ adoption of laws applicable to the marine environment to the implementation of Annexes I and III to the International Convention for the Prevention of Pollution from Ships.¹⁰³ Proponents of this reading point to the legislative history of the Law of the Sea conferences, which contains the suggestion by several states that UNCLOS article 42, paragraphs (1)(a) and (1)(b) be broadened.¹⁰⁴ As this suggestion was not adopted in UNCLOS’ final language, the proponents argue these articles should be read to foreclose any other regulatory regime.¹⁰⁵

IX. Denial, Hampering, or Impairment of Transit Passage

Another point of contention relates to what constitutes impairment of the right of transit passage. Per article 42(2), border states’ laws relating to transit passage “shall not . . . have the practical effect of denying, hampering or impairing the right of transit passage.”¹⁰⁶ Article 44 declares “[s]tates bordering

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Bateman & White, *supra* note 70, at 194–95.

¹⁰⁰ Beckman, *supra* note 61, at 344.

¹⁰¹ UNCLOS, *supra* note 3, art 42(1)(a); Beckman, *supra* note 61, at 344.

¹⁰² UNCLOS, *supra* note 3, art 42(1)(b).

¹⁰³ *Id.*; Beckman, *supra* note 61, at 344. See Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, *adopted* Feb. 17, 1978, SEN. TREATY DOC. No. 96-3 (1980) [hereinafter MARPOL 73/78]. Annex I to MARPOL 73/78 governs discharges of oil from ships, and Annex III governs harmful substances in packaged form, such as freight containers or portable tanks. *Id.* Adherence to Annex I is mandatory for all signatories of MARPOL 73/78, while participation in Annex III is optional. *Id.* art. 14.

¹⁰⁴ Beckman, *supra* note 61, at 344.

¹⁰⁵ *Id.*

¹⁰⁶ UNCLOS, *supra* note 3, art 42(2).

straits shall not hamper transit passage [T]here shall be no suspension of transit passage.”¹⁰⁷

Australia’s Marine Notice 16/2006 addressed this issue directly by indicating it would not stop, board, or arrest ships failing to carry a pilot while they transited the strait. The United States interprets the notice to mean that the enforcement of Australian domestic laws requiring a pilot would only occur after an offending ship had called upon an Australian port.¹⁰⁸ Supporters of a more permissive reading of UNCLOS focus on the “practical effect” language of article 42(2), narrowing the analysis to the following question: Does the pilotage system in question in fact restrict, impede, or lessen a ship’s ability to transit the strait?¹⁰⁹ In essence, this part of the argument assumes that a compulsory pilotage regime might be permissible under UNCLOS if in its application it does not in fact deny, hamper, or impair transit passage.¹¹⁰ In Australia’s case, advocates of the system focused on how the pilotage program is run, including the cost and the availability of competent pilots, application of the pilotage program to only the most at-risk vessels, and the availability of legal defenses to owners and masters of vessels that failed to take a pilot.¹¹¹ Australia’s critics need never get to this analysis, because they either reject the idea that any system of compulsory pilotage could be permissible under UNCLOS or believe that Australia’s actions insulted the IMO’s process.¹¹²

Another is worth examining is how the international community should treat conflicting UNCLOS provisions. In this case, to the extent that UNCLOS part III’s transit passage regime conflicts with part XII’s marine environmental protection measures, which provisions should be given more weight?¹¹³ “[A]lthough the provisions of UNCLOS should be read consistently with the language in the particular provisions and consonantly with the other provisions throughout the Convention, this does not determine the balance between various parts of the Convention.”¹¹⁴ Further, domestic and international priorities and political landscapes evolve over time. What some may call a “greening of UNCLOS” others may call an acknowledgement of a greater understanding of

¹⁰⁷ UNCLOS, *supra* note 3, art 44.

¹⁰⁸ AUSTL. MAR. SAFETY AUTH., *supra* note 87.

¹⁰⁹ Bateman & White, *supra* note 70, at 194–95.

¹¹⁰ *Id.*

¹¹¹ Bateman & White, *supra* note 70, at 196.

¹¹² Tommy Koh, President, Third United Nations Conference on the Law of the Sea, The Law of the Sea: Some Personal Reflections, 7th Cedric Barclay Memorial Lecture at the XVI International Congress of Maritime Arbitrators (27 Feb. 2007), available at http://www.spp.nus.edu.sg/ips/docs/pub/sp_tommykoh_7th%20Cedric%20Barclay%20Lecture_270207.pdf.

¹¹³ Bateman & White, *supra* note 70, at 193.

¹¹⁴ *Id.*

the magnitude of the threats of pollution on the world's oceans.¹¹⁵ While it is an accepted axiom of construction that specific provisions carry more weight than general ones, the relative weight of specific provisions is debatable.

X. Compulsory Pilotage and the Future of Transit Passage

What then is the future of transit passage? Has Australia's unilateral act of imposing a compulsory pilotage regime in the Torres Strait created the proverbial slippery slope that will lead to the demise of transit passage and, perhaps, UNCLOS itself?¹¹⁶ At the other extreme, at least one commentator argues that the Torres Strait is not a precedent for the employment of compulsory pilotage regimes in other straits used for international navigation, because it is made *sui generis* by its being "part of one of the marine wonders of the earth: the Great Barrier Reef,"¹¹⁷ having particularly hazardous navigational characteristics and being of unique cultural significance to indigenous peoples.¹¹⁸ Neither of these arguments is particularly compelling.

The Straits of Malacca and Singapore may be the next frontier for transit passage and compulsory pilotage. In many ways, the Malacca and Singapore Straits are much more commercially and strategically significant than the Torres Strait. Roughly 15 billion barrels of oil move through the Strait of Malacca per day, most bound for Asian consumers such as China and Japan.¹¹⁹ Transit through the Strait has been disrupted in the past both by piracy, collisions, and oil spills.¹²⁰ The three border states—Indonesia, Malaysia, and Singapore—have attempted to act jointly in their efforts to enhance the safety of navigation through the straits since the early 1970s.¹²¹ However, it would be a mistake to view these three nations as completely concurrent interests.¹²² There is an extensive traffic separation scheme (TSS) running approximately 250 nautical miles through the strait.¹²³ The TSS has been in place since 1981 and

¹¹⁵ *Id.* at 193.

¹¹⁶ See, e.g., Grunawalt, *supra* note 5, at 17.

¹¹⁷ Bateman & White, *supra* note 70, at 197.

¹¹⁸ *Id.*

¹¹⁹ *World Oil Transit Chokepoints*, *supra* note 52.

¹²⁰ *Id.*

¹²¹ Hasjim Djalal, The Development of Cooperation on the Straits of Malacca and Singapore (24 Nov. 2008) (transcript on file with the Naval Law Review), available at www.nippon-foundation.or.jp/eng/current/malacca_sympo/6.doc.

¹²² See generally Mark J. Valencia, Global Env't Facility/U.N. Dev. Programme/IMO Reg'l Programme for the Prev. and Mgmt. of Marine Pollution in the E. Asian Seas [MPPEAS], *Marine Pollution Management in the Malacca/Singapore Straits: Lessons Learned*, MPPEAS Doc. MPP-EAS/Info/99/195, available at <http://beta.pemsea.org/sites/default/files/mppeas-info-1999-195.pdf>.

¹²³ Vincent Wee, *Malacca, S'pore Strait Can Handle Rise in Vessel Traffic*, BUS. TIMES (Singapore), 29 Oct. 2009, available at http://www.sgmaritime.com/Singlenews.aspx?DirID=103&rec_code=475751.

has had significant success in lowering the incidence of vessel groundings.¹²⁴ Unfortunately, the incidence of accidents has greatly increased since the early 1990s.¹²⁵ Ninety percent of the casualties were caused by collisions resulting from poor seamanship.¹²⁶

There is some discussion of a pilotage system for the Straits of Malacca and Singapore;¹²⁷ however, no border country has yet made a request to the IMO. It is unclear whether such a request would end the cooperative relationship between Indonesia, Malaysia, and Singapore with regard to governance of the Strait, as Singapore is particularly concerned with any measure that could affect its financial dependence on shipping traffic into the Port of Singapore.¹²⁸

Are the Straits of Malacca and Singapore one bad oil accident away from imposition of a compulsory pilotage system? This type of “focusing event,” which has the capacity to shift public opinion and result in rapid policy change, has a long history in shaping policy.¹²⁹ To that end, could compulsory pilotage be the savior of transit passage instead of leading to its demise? Despite the uproar surrounding compulsory pilotage in the Torres Strait, the system is widely used. Even U.S. naval vessels who are exempt from the policy by virtue of sovereign immunity often take on a local pilot when transiting the Torres Strait.¹³⁰ This is particularly interesting given that the United States has had a Freedom of Navigation Program since 1979, the objective of which is to maintain freedom of navigation through nonacquiescence to excessive claims of maritime jurisdiction.¹³¹

XI. Conclusion

Australia may have unwittingly given the international community the answer to balancing the problem of marine pollution and freedom of navigation through straits used for international navigation. By excluding sovereign immune vessels, which may choose to use the pilotage system on a voluntary basis, Australia excluded the class of vessels that was one of the main concerns of many of the strongest proponents of the transit passage regime. By instituting a policy that does not include the boarding of transiting vessels and that ensures that pilots are readily available, competent, and reasonably priced, Australia has

¹²⁴ Valencia, *supra* note 122, at 132.

¹²⁵ *Id.* at 26.

¹²⁶ *Id.*

¹²⁷ Djalal, *supra* note 121, at 12.

¹²⁸ See *id.*; Valencia, *supra* note 121.

¹²⁹ See Tower, *supra* note 39.

¹³⁰ Bateman & White, *supra* note 70, at 197.

¹³¹ Grunawalt, *supra* note 5, at 17.

taken much of the wind out of the argument that compulsory pilotage may have the practical effect of hampering transit passage.

The most convincing argument against Australia is that they abused the IMO process to obtain IMO Resolution MEPC 133(53) and therewith, at least arguably, the authority to institute its compulsory pilotage regime.¹³² Only a state party challenge to Australia's regulations invoked under the dispute settlement procedure of UNCLOS part XV will determine the legality of Australia's compulsory pilotage system.¹³³ But as a future matter, the most vocal of the maritime states should consider which is worse, a regulated compulsory pilotage system through some of the world's most busy and hazardous straits used for international navigation or the demise of permissive transit rights due to a catastrophic focusing event.

¹³² Beckman, *supra* note 61, at 338.

¹³³ *Id.* at 348.

BOOK REVIEW

Reviewed by Major John C. Dohn II, JA, USA*

***7 Deadly Scenarios: A Military Futurist Explores War in the 21st Century*¹**

I. Introduction

In *7 Deadly Scenarios*, defense analyst Dr. Andrew F. Krepinevich presents seven vignettes that illustrate a variety of challenges facing not only the U.S. Military but the United States as a whole. The scenarios are written as standalone situational briefings that one might read if they were a senior policy maker in the not too distant future. Using this technique, Krepinevich presents interesting, albeit bleak, pictures of the future in an imaginative and thought provoking manner. However, anyone who reads this book with the intention of divining the future of warfare would be approaching the book from the wrong angle and would risk missing the author's message. The message, simply stated, is that the United States must take action to prepare for predictable future challenges or risk paying "a price in compromised security, wasted resources, and lost lives of young service men and women."²

II. About the Author

The author's biography is notable in both academic and professional respects. His education is extensive, having graduated from the U.S. Military Academy at West Point and obtained master in public administration and doctor of philosophy degrees from Harvard.³ He served in the U.S. Army for twenty-one years and taught at several universities, including The Johns Hopkins University School of Advanced International Studies.⁴ He has a wide range of experience as a consultant, having advised several Secretaries of Defense, the CIA's National Intelligence Council, and the governments of several U.S.

* Major Dohn is a judge advocate in the U.S. Army and currently assigned as a trial attorney with the Contract and Fiscal Law Division of the U.S. Army Legal Services Agency.

¹ ANDREW F. KREPINEVICH, *7 DEADLY SCENARIOS* (2009).

² KREPINEVICH, *supra* note 1, at 317.

³ Biography of Andrew F. Krepinevich, CTR. FOR STRATEGIC AND BUDGETARY ASSESSMENTS, <http://www.csbaonline.org/about/people/akrepinevich/> (last visited Jan. 9, 2012).

⁴ *Id.*

allies.⁵ Currently, he is the President of the Center for Strategic and Budgetary Assessments (CSBA),⁶ a defense policy think tank based in Washington, D.C.⁷

III. Organization and Content

The organization of *7 Deadly Scenarios* is quite basic. The table of contents lists an introduction, seven separate scenarios, and a conclusion that neatly divide the book into three sections. In the introduction, Krepinevich provides a quick overview of what scenarios are, how they may be useful, and what might happen if their lessons are ignored. Krepinevich emphatically explains that “scenarios do *not* attempt to predict the future.”⁸ They are meant “to identify and highlight potential changes.”⁹ Scenarios are an indispensable tool in crafting strategy, because they enable decision makers to discern both asymmetrical advantages and disadvantages such that those decision makers may better allocate resources.¹⁰ Thus, the scenarios Krepinevich presents are not meant to provide the reader a glimpse of the future; rather, they are presented to allow the reader to discover these asymmetrical advantages and disadvantages today.

From their titles alone, the scenarios appear unique and highly diverse. The first scenario is entitled “The Collapse of Pakistan.”¹¹ It details circumstances in which Pakistan’s regime fails and the United States is left with a variety of difficult decisions, such as whether to send troops into Pakistan to secure Pakistani nuclear weapons or risk their falling into the hands of a terrorist group.¹² The second scenario, “War Comes to America,” presents a future in which terrorists obtain numerous nuclear devices and detonate them with varying degrees of success throughout the United States.¹³ The third scenario, “Pandemic,” describes a potent avian flu’s impact on the United States when it triggers a flood of illegal immigrants.¹⁴ The fourth scenario, “Armageddon: The Assault on Israel,” envisions Iran and Israel propelling the Middle East towards a nuclear war.¹⁵ The fifth scenario, “China’s ‘Assassin’s Mace,’” places the United States and China on a collision course in the Taiwan Strait.¹⁶

⁵ *Id.*

⁶ *Id.*

⁷ *Our Mission*, CTR. FOR STRATEGIC AND BUDGETARY ASSESSMENTS, <http://www.csbaonline.org/about/mission/> (last visited Jan. 9, 2012).

⁸ KREPINEVICH, *supra* note 1, at 27.

⁹ *Id.*

¹⁰ *Id.* at 15.

¹¹ *Id.* at 30–62.

¹² *Id.*

¹³ *Id.* at 63–90.

¹⁴ *Id.* at 91–124.

¹⁵ *Id.* at 125–68.

¹⁶ *Id.* at 169–209.

The sixth scenario, “Just Not-On-Time: The War on the Global Economy,” highlights the delicate nature of globalization.¹⁷ Finally, Krepinevich imagines the aftermath of failed efforts in Iraq in the seventh scenario, “Who Lost Iraq?”¹⁸

While it is outside the scope of this review to fully encapsulate the scenarios individually, when reviewed together, they reveal several disturbing trends that Krepinevich believes the United States is currently facing or will soon face as a result of the U.S. Military’s “wasting assets.”¹⁹ The first trend is that the United States’ ability to project its influence around the world is increasingly limited.²⁰ The second trend is that the United States is increasingly unable to protect its interests in the global commons.²¹ The third trend is an ever increasing inability of the United States to protect the homeland from both disease and violence.²² Although the scenarios highlight these problematic trends, they do not suggest solutions to reverse the trends, leaving the readers wondering what can be done to mitigate, if not avoid, potential disasters. Krepinevich purposefully leaves these problems unresolved to emphasize the point that at the moment, if any of the imagined circumstances were to occur, the United States would find itself unprepared. Krepinevich argues this is due in part to our leaders being too preoccupied by the ongoing conflicts in Iraq and Afghanistan and in part to a general lack of appreciation for strategy and planning at the highest levels of government.²³ Fortunately, Krepinevich provides a course of action in an attempt to remedy this situation.

In his conclusion, Krepinevich identifies two requirements necessary to maximize the nation’s ability to arrive at timely solutions. First, he argues defense planners need a “strategic concept” to identify the goals they are trying to achieve and a plan for how they might achieve them.²⁴ Second, defense planners need a process that would validate their approach.²⁵ Krepinevich goes on to explain that numerous barriers hinder the implementation of these two requirements. The first barrier is a general and persistent tendency by our senior leaders to equate strategy with desired outcomes.²⁶ Rather than articulating how

¹⁷ *Id.* at 210–45.

¹⁸ *Id.* at 247–83.

¹⁹ *Id.* at 288. The term “wasting asset” became common among U.S. policymakers in the early days of the Cold War. Andrew F. Krepinevich, Jr., *The Pentagon’s Wasting Assets*, FOREIGN AFF., Jul.–Aug. 2009, at 18, 19. For example, the U.S. monopoly on nuclear weapons was a strategic advantage that became a “wasting asset” after the Soviet Union tested its first atomic bomb. *Id.*

²⁰ KREPINEVICH, *supra* note 1, at 289.

²¹ *Id.* at 288–89.

²² *Id.*

²³ *Id.* at 289–94.

²⁴ *Id.* at 289.

²⁵ *Id.*

²⁶ *Id.* at 291.

to allocate scarce resources to achieve a desired goal, senior leaders tend to state the ends without discussing the means. A second barrier is the failure of our nation to understand its enemies.²⁷ A third barrier is a lack of appreciation by senior leaders for good strategy. They tend to “worry about today, today and tomorrow, tomorrow.”²⁸ A fourth barrier is the notion the United States is a land of unlimited resources.²⁹ This notion is further exacerbated by the budgeting process, which tends to penalizes efficient agencies able to “make due” with less and reward inefficient agencies with larger budgets.³⁰ Finally, Krepinevich notes a bureaucratic barrier resulting from the reluctance of bureaucracies to embrace change.³¹

To overcome these barriers, Krepinevich advocates convincing senior civilian and military leaders there is value in strategic planning. To accomplish this in civilian agencies, Krepinevich proposes modeling the current National Security Council (NSC) after President Eisenhower’s NSC.³² While the NSC still exists today, the Planning Board, essentially an autonomous advisory committee to the Eisenhower’s NSC, no longer exists.³³ Besides the above, Krepinevich argues additional steps are required to ensure the implementation of NSC decisions. To this end, he again looks to the Eisenhower administration and its establishment of the Operations Coordinating Board (OCB). The OCB reported directly to the President, apprising him of how well the NSC’s decisions were being implemented.³⁴

As for the military, Krepinevich recommends reorienting the Joint Forces Command’s (JFCOM) focus from the ongoing missions in Iraq and Afghanistan to developing operation strategies for future missions.³⁵ He also suggests that the JFCOM commander be given a more enduring tenure, as well as seats on the Defense Acquisition Board and the Joint Requirements Oversight Counsel.³⁶ Finally, the JFCOM commander should be routinely groomed as the next Vice-Chairman of the Joint Chiefs of Staff.³⁷ Krepinevich asserts that executing these steps would accomplish two things: allow the JFCOM commander to discern emerging trends and help provide long term continuity at the highest levels of military operations. The end result is senior leadership

²⁷ *Id.* at 292.

²⁸ *Id.* at 293.

²⁹ *Id.* at 294.

³⁰ *Id.* at 293–94.

³¹ *Id.* at 294.

³² *Id.*

³³ *Id.* at 296.

³⁴ *Id.*

³⁵ *Id.* at 307.

³⁶ *Id.*

³⁷ *Id.*

would be better able respond as the need arises, if not before, and make informed decisions concerning the allocation of ever more scarce resources.³⁸ Krepinevich believes that unless these steps are taken, the nation will continue to be at risk for a cataclysmic event as great as, if not greater than, Pearl Harbor or 9/11.³⁹

IV. Strengths and Weaknesses

Krepinevich does several things quite well in his book. First, he does an excellent job explaining the scenarios and how their lessons may be used to great benefit or ignored at great risk. Second, he makes a compelling argument for the need of a greater appreciation of strategy by our nation's leaders. Third, he proposes some viable courses of action to help overcome the barriers that prevent leadership from fully embracing strategic thinking and executing strategic policies. Fourth, Krepinevich is balanced in his message, being critical of senior leadership as a whole rather than finding fault with one political party or agency over another. Finally, the scenarios are individually well crafted. Each scenario is imaginative, yet plausible, leaving readers with a sense of urgency one can only hope is shared by our senior leadership.

While the book successfully delivers Krepinevich's message, there are several notable weaknesses. First, the scenarios, when read together—as well crafted as they are in and of themselves—appear formulaic and stale in parts. Each scenario starts out with a historically accurate quote, and each presents accurate historical footnotes to help lay a foundation in reality.⁴⁰ Not surprisingly, the vast majority of the footnotes are based on sources that are fictional. In fact, every footnote dated after the fall of 2008 is fictitious.⁴¹ With this technique, the author is generally successful in blurring the line between historical actuality and the projected historical future. However, certain footnotes come across as contrived. For example, in the second scenario, “War Comes to America,” a footnote cites the cynical headline, “Rag-Heads 60,000; US 0.” The citation seems too cavalier in light of the gravity of the situation. This weakness could have been mitigated if the scenarios were followed up with an epilogue discussing actual references that provided the inspiration for the scenarios’ fictional authorities.

Second, Krepinevich tends to assume knowledge on the part of the reader which may not exist. For example, in advocating the changes to the NSC and JFCOM, it would have been helpful for him to explain how those entities

³⁸ *Id.* at 316.

³⁹ *Id.*

⁴⁰ E.g., *id.* at 29.

⁴¹ *Id.*

are currently set up and how they are failing, rather than just stating how they should be modeled. Why did the Planning Board cease to function? Was it replaced by a more modern equivalent? Less informed readers are left wondering why the Planning Board went away if it was so useful. Krepinevich makes other assertions he requires readers to take at face value. Is it really true our senior leaders have no understanding of or appreciation for strategy? This assertion would carry more weight were it backed up with statistics, such as a listing of budgets cuts or examples of specific strategic programs targeted for elimination.

Finally, I believe the author's message would be stronger if he provided concrete examples of the strategic allocation of resources and "wasting assets," as he does in his article *The Pentagon's Wasting Assets*.⁴² There, he addresses several points made in *7 Deadly Scenarios*, but he also provides telling examples of military programs that have been eliminated due to their diminished strategic value.⁴³ For example, he lauds Secretary Gates' decision to cancel funding for certain combat vehicles that are part of the Army's Future Combat Systems. He also contrasts this with programs that continue to be funded despite their questionable strategic value, such as the Marine's Expeditionary Fighting Vehicle.⁴⁴ The inclusion of these or similar examples would have provided Krepinevich's message a dose of much needed reality.

V. Lessons for Leaders

A judge advocate reading *7 Deadly Scenarios* may feel like an interloper. Although serious legal issues arise throughout the scenarios—such as the use of force against illegal immigrants in the "Pandemic" scenario and the rise of Islamic law in "The Collapse of Pakistan"—these issues are present solely to compliment the book's primary purpose of highlighting the need of and appreciation for strategy. However, from a Soldier's perspective, especially one who finds himself in a position to affect operations and policy, the lessons this book offers are clear and invaluable: resources are becoming scarce, assets are wasting away, and if we fail to cultivate strategies to address current trends and institute a process for its implementation, the nation will continue to be at risk to catastrophic disasters.

VI. Conclusion

Despite its perceived faults, *7 Deadly Scenarios* delivers an important message in an imaginative and thought provoking manner. For this reason

⁴² Krepinevich, *supra* note 19, at 31.

⁴³ *Id.*

⁴⁴ *Id.*

alone, I would recommend this book to any thoughtful voter, with the expectation that they would gain a better appreciation of strategy and understand the need to elect strategic minded leaders. Otherwise, we are left to rely upon the hope our senior leadership will take Krepinevich's message to heart while our enemies will not.⁴⁵

⁴⁵ In 1932, Rear Admiral Harry Yarnell, USN demonstrated the vulnerability of Pearl Harbor by slipping two aircraft carriers in close from the northeast. He launched 152 aircraft that theoretically could have obliterated all airplanes on the ground and sunk most of the ships at anchor. "Nearly ten years later carriers of the Imperial Japanese Navy, attacking Pearl Harbor . . . proved that Admiral Yarnell, not the umpires or the Army, had gauged the future correctly." KREPINEVICH, *supra* note 1, at 1–3.